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AN
E S S A Y

ON THE
NATURE AND OPERATION
OF

Fines and Recoveries.

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CHAPTER I.

OF THE

O R I G I N

OF

Common Recoveries,

And the Manner in which they are
suffered.

1. **A** RECOVERY in its most extensive sense, is the restitution of a former right, by the solemn judgment of a court of justice; and judgments whether obtained after a real defence made by the tenant, or upon his default, or feint plea, have equally the same force and efficacy, to bind the right of the land so recovered, and to vest a free and absolute estate in fee simple in the recoveror.

Origin of Recoveries.

2. A common recovery is a judgment obtained in a fictitious suit brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit.

*Bac. Tracts
148.*

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B

3. A

Chap. I.

3. A common recovery departs so far from the original modes of transferring property, and is in its process so complicated and artificial, that if we had no historical evidence of the time when it was first adopted among the common assurances of the law, we might safely pronounce it to be in some respects a modern invention; but the fact is well known that we are indebted to the ingenuity of the ecclesiastics for the introduction of common recoveries, in order to evade the statutes of *mortmain*, by which they were prohibited from purchasing or receiving under pretence of a free gift, any lands or tenements whatsoever. To effect this purpose the religious houses used to set up a fictitious title to the lands intended to be given or sold, and brought an action against the tenant to recover them; the tenant by collusion made no defence, whereby judgment was given for the religious house, which then recovered the lands by sentence of law, upon a supposed prior title.

Although proceedings of this kind were carried on by a species of conventional fraud, between the religious house and the tenant of the land, yet the judges held, that in these cases the religious communities did not appropriate

Recoveries.

3

appropriate such lands *per titulum doni vel alterius alienationis*, as the statute of mortmain expresses it, nor that they were within the words *aut alio quovis modo arte vel ingenio*; for as recoveries were prosecuted in a course of law, they were presumed to be just; and it was accordingly held by the courts of justice that they were not within the statute.

Chap. I.
Plowd. 43.

4. The notoriety and evidence which attended feigned recoveries was such, that they were not used by the ecclesiasticks alone, but were soon adopted by lay persons, as a common mode of transferring lands. Thus it appears by the statute of Gloucester 6 Ed. 1. that feigned recoveries were at that time in constant use, for it is provided by the 11th chapter of that statute, that a termor for years might falsify a feigned recovery, suffered by the owner of the inheritance.

5. The want of moderation on the part of the ecclesiastics counteracted the effects of their ingenuity; for being gratified by the success of their practices, they had such frequent recourse to feigned recoveries as to occasion a parliamentary interference: hence by the statute of West-

Chap. I.



minster 2. 13 *Ed.* 1. c. 32. it was enacted, that in all cases where ecclesiastical persons recovered lands by default, a jury should try the right of the demandants to the land, and if the religious house was found to have a title, they should recover seisin, otherwise it should be forfeited to the immediate lord of the fee, in the manner directed by the statute of mortmain.

6. In consequence of this restraint, feigned recoveries seem to have been disused for a considerable time, nor were they again brought into general practice until some centuries afterwards, when they were resumed as a mode of evading the strictness of the statute *de donis conditionalibus*; and as they still continue to be used chiefly for this purpose, it will be necessary to give some account of that statute, and to shew how its rigour has been eluded by the operation of a common recovery.

The establishment of the feudal law, by the *Normans*, was immediately attended with that general restraint on alienation, which was a striking part of that singular policy. During the reign of *William* the Conqueror and of his sons, the doctrine of
non-

non-alienation was, for various reasons, very strictly enforced. The greater part of the landed property of the kingdom had been distributed among the *Norman* barons as strict and proper feuds, and a considerable jealousy prevailed against all those of *Saxon* origin, lest they should attempt to reinstate themselves in their antient possessions; great care was therefore taken, during that period, that all the vassals of the crown, who could alone be depended on in case of any insurrection, should be constantly ready and able to perform their military services.

The state of commerce was also then so very low, and money so extremely scarce, that even if a power of alienation had existed, it would probably have produced but a very trifling alteration in the transfer of landed property. But when the *Norman* family was firmly established on the throne, and all apprehensions of a disputed claim had subsided, it was no longer politic, on the part of the crown, to administer to the independence of the haughty barons, by making their estates lasting and hereditary; on the contrary, it was the interest of the sovereign to diminish the formidable in-

Chap. I.

Glanville,
lib. 7. c. 1.

fluence of the superior lords, by permitting them to dispose of their property. Fortunately, the temper of the times, arising from the rage of Crusades, seconded this interest; so that motives of policy, the increase of agriculture and commerce, made it altogether necessary to relax the strictness of the feudal law with respect to alienation. Accordingly we find that in the reigns of *Henry 2.* *John*, and *Henry 3.* these restraints considerably diminished, and the statutes *quia emptores terrarum*, 18 *Ed. 1. c. 1.* and 1 *Ed. 3. c. 12.* enabled all persons to dispose of their lands as they pleased.

7. But in consequence of that passion, so natural to all men, of perpetuating their possessions in their own families, a new restraint on alienation was invented by the introduction of conditional fees, which were estates restrained to some particular heirs, exclusive of others; they were called conditional fees on account of the condition expressed or implied in the donation, that if the donee died without such particular heirs, the land should revert back to the donor.

The general propensity which seems to have prevailed at that time towards a liberty

berty of alienation, and probably a foresight of the good consequences which would thereby accrue to the community, induced the judges to construe these conditional fees in a very liberal manner: instead of declaring that estates of this kind must inevitably descend to those heirs who were particularly described in the grant, according to the strict principles of the feudal law (*a*), and that no person seised of such an estate should be enabled by his alienation to defeat the succession of those who were mentioned in the gift, or the lord's right of reverter, they had recourse to an ingenious device taken from the nature of a condition. It is a maxim of the Common Law, that when a condition is once performed, it is thenceforth entirely gone, and the thing to which it was before annexed, becomes absolute and wholly unconditional; upon this ground the judges determined, that as soon as the grantee of

(a) *Jus feudale non solum tallis non adversari, sed maxime eis favere constat; non solum quod nullas feminas ad successionem admittet, sed multo magis, quod tenorem concessionis semper servandum jubeat, hæreditatemque secundum eam deferendam expresse jubeat.* Craig de Jure Feud. 147.

Chap. I.

a conditional estate had issue born, his estate became absolute by the performance of the condition; so that it might then be aliened, charged with debts or any other incumbrances, and forfeited for treason.

8. This mode of construing conditional fees directly contravened the purposes for which they were created, and therefore the nobility, whose constant object it was to perpetuate their possessions in their own families, made a more successful attempt to obtain this end, by procuring the statute *de donis conditionalibus*, which enacted, that where lands were given to a man and the heirs of his body, he should not have a power of alienating them, nor of defeating the succession of his own issue or of the reversioner.

No circumstance can more forcibly evince the power of the aristocratical party at that time, than the enacting the statute *de donis*; it affords the strongest arguments to shew the bondage in which the powerful barons at once held both the sovereign and people. The statute of *quia emptores* had taken place by the influence of the crown, for the reasons

sons formerly mentioned, and the sentiments of the judges, who certainly took part with the people, in resisting the pernicious tendency of perpetuities, may be readily collected from the construction which they put upon conditional fees, and from the alacrity with which they availed themselves of a legal maxim to relax the strictness of non-alienation, and thereby to give the tenants who had performed the condition, such a dominion over their property as might best answer the purposes of civil society. But by the statute *de donis*, the haughty pride and hereditary independence of the nobles were established by the sacrifice of natural justice, natural affection, and natural allegiance; for by this statute the tenant in tail could neither alienate his estate, nor charge it with the payment of his debts, with portions for his younger children; and, by a very extraordinary construction, it was even held that he could not forfeit it for high treason. Hobart 340.

9. Many attempts were made by the people to procure a legislative repeal of this

this offensive statute (a) but they were constantly and successfully opposed by the great barons ;

(a) We find in the Rolls of Parliament, Vol. 2. p. 142, No. 25, that in the 17 Ed. 3. the Commons presented the following petition to the king: “ *Item que l'estatut de Westminster second soit declarer en quel degre le issue en la taille soit alienez.* ”—to which his majesty answers,—“ *La ley en ce cas decea en arriere soit tenue desore.* ”—Sir Edward Coke gives the following account of the statute *De Donis*, “ the true policy of the Common Law was overturned by “ the statute *de donis conditionalibus*, 13 Ed. 1. which “ established a general perpetuity by act of parliament for all those who had or would have it, by force “ whereof all the possessions in *England* in effect were “ entailed accordingly, which was the occasion and “ cause of the said, and divers other mischiefs ; and “ the same was attempted, and endeavoured to be “ remedied, at divers parliaments, and divers bills “ were exhibited accordingly, (which I have seen) “ but they were always on one pretence or other, “ rejected. But the truth was, that the lords and “ commons knowing that their estates tail were not “ to be forfeited by felony or treason as their estates “ of inheritance were before the said act (and chiefly “ in the time of *Henry 3.* in the baron's war) and finding that they were not answerable for the debts or “ incumbrances of their ancestors, nor did the sales, “ alienations, or leases of their ancestors, bind them “ for the lands which were entailed to their ancestors, “ they always rejected such bills, and the same con-

barons; however, as the inconveniencies arising therefrom were so manifest, the ingenuity of the judges was continually exerted in contriving different modes to evade it; at length a case arose in the 12 *Edw.* 4. in which it was in effect determined, upon principles which will be explained in a subsequent chapter, that a common recovery suffered by a tenant in tail should operate as an effectual bar to his estate tail, and also to all the remainders and the reversion depending thereon. From that time common recoveries have become extremely frequent, and have ever since been considered as common assurances, by means of which, tenants in tail are enabled to dispose of their estates tail, or to convert them into estates in fee simple.

“tinued in the residue of the reign of *Ed.* 1. and
 “of the reigns of *Ed.* 2. *Ed.* 3. *Rich.* 2. *Hen.* 4. *Hen.*
 “5. *Hen.* 6. and till about the 12th year of *Ed.* 4.
 “when the judges, on consultation had among them-
 “selves, resolved, that an estate tail might be docked
 “and barred by a common recovery, and that by rea-
 “son of the intended recompence the common reco-
 “very was not within the restraint of the said perpe-
 “tuity made by the said act of 13 *Ed.* 1.”—6 *Rep.*
 40. b. *Sir A. Mildmay's Case.*

Chap. I.

Manner in
which they
are suffered.

10. A common recovery being a judgment obtained in a real action, although it be fictitious, yet the same mode of proceeding must be pursued, and all those forms strictly adhered to which are necessary to be observed in an adversary suit; for, as *Pigot* observes, though common recoveries are to some intents deemed fictitious proceedings, yet it is necessary there should be *actores fabulæ*.

The first thing therefore requisite to be done, in suffering a common recovery, is, that the person who is to be the demandant, and to whom the lands are to be conveyed, should sue out a writ or *præcipe* against the tenant of the freehold; whence such tenant is usually called the tenant to the *præcipe*.

In obedience to this writ, the tenant of the freehold appears in court, either in person or by his attorney; but instead of defending the title of the land himself, he calls on some other person, who, upon the original purchase is supposed to have warranted the title, and prays that such person may be called in to defend the title which he warranted, or otherwise to give the tenant lands
of

of equal value to those which he shall lose by defect of his warranty. This is called the voucher, *vocatio*, or calling to warranty.

The person thus called to warrant the title (who is usually called the vouchee) appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The demandant then desires leave of the court to imparle or confer with the vouchee in private, which is granted of course.

Soon afterwards the demandant returns to court, but the vouchee disappears, or makes default; in consequence of which it is presumed by the court that he had no title to the lands demanded in the writ, and therefore could not defend them, whereupon judgment is given for the demandant, now called the recoveror, to recover the lands in question against the tenant, and judgment is also given for the tenant to recover against the vouchee, lands of equal value, in recompence for the lands so warranted by him, and now lost by his default.

This

This is called the recompence, or recovery in value ; but as it is customary to vouch the cryer of the court of Common Pleas, who is hence called the common vouchee, the tenant can only have a nominal recompence for the lands thus recovered against him by the demandant.

A writ of *habere facias seisinam* is then sued out, directed to the sheriff of the county in which the lands thus recovered are situated ; and on the execution and return of this writ, the recovery is completed.

11. The recovery here described is with single voucher ; but a recovery may, and is frequently suffered with double, treble, or farther voucher, as the exigency of the case may require.

In a recovery with double voucher, the tenant or proprietor of the land, conveys an estate of freehold to some indifferent person, against whom the writ is brought ; the tenant to the *præcipe* then vouches the proprietor of the land, who vouches over the common vouchee.

12. In every common recovery the demandant acquires the fee simple of the lands recovered, although the word heirs be not mentioned in the judgment, because the writ being brought for the absolute property or fee simple of the lands, if judgment is obtained, it must be for as much as was demanded in the writ, and in all adversary suits every recoveror recovered a fee simple.

CHAPTER II.

Of the Writ of Entry.

13. **I**T appears from the preceding chapter, that the following circumstances are requisite to the validity of a common recovery: First, that a proper writ be sued out: Secondly, that the person against whom the writ is brought, be actual tenant of the freehold: Thirdly, that such tenant do vouch over some other person: Fourthly, that judgment be given for the demandant against the tenant, and for the tenant against the vouchee: And, Fifthly, that the recovery be executed by the sheriff of the county in which the lands lie. We shall now proceed to explain more particularly those different circumstances.

3 Rep. 3. a.

A common recovery being a judgment in a real action, it cannot of course be regularly commenced without a proper original writ; however, if a recovery is suffered without an original writ, it is not absolutely void, but only voidable.

A com-

14. A common recovery may be suffered on any writ, by which lands are demandable, but the writ which is now usually sued out for that purpose is a writ of entry *sur disseisin* in the nature of an assize, which is properly grounded on a disseisin done to the demandant himself; it may be brought in the *per*, the *per* and the *cui*, or the *post*, and in common recoveries it is always brought in the *post*.

The reason why this writ was chosen for the purpose of suffering common recoveries was, because the tenant may, in this species of action, vouch at large, and is not bound to vouch within the degrees of the *per*, the *per* and the *cui*, or the *post*; so that it is the safest action for purchasers, who need not fear writs of error for wrong or illegal vouchers. In this writ the demandant alleges, that the tenant has no legal title to the land, but came into possession of it after one *A. B.* had turned out the demandant.

Booth Real
Actions 176.
2 Inst. 154.

15. When a recovery became a common assurance, the king by that means frequently lost his fines for alienation; but by the statute 32 Hen. 8. c. 1. s. 15. it was

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C

enacted,

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enacted, that fines for alienation should be paid upon obtaining writs of entry in the *post* for suffering common recoveries.

2 Rol. Rep.
67.

16. The writ on which a recovery is suffered ought to be similar in every respect to a writ which is sued out for the purpose of commencing an adversary suit. The courts, however, make a distinction between a *breve adversarium* and a *breve amicabile*, and will construe the latter in a much more favourable manner than the former.

Dormer's
Case, 5 Rep.
40. S. C.
Poph. 22.

Thus where a writ of error was brought to reverse a common recovery, which had been suffered on a writ of entry in the *post* of a manor, and of a yearly rent or pension of four marks, and also of an advowson. one of the errors assigned was, that a writ of entry in the *post*, does not lie of an advowson, But it was unanimously determined, that the judgment should be affirmed, because a common recovery was not to be compared to a judgment in an adversary suit, as it is by usage and custom become a common assurance and conveyance of lands, and is had by the mutual consent of the parties, *et consensus tollit errorem*. Besides,
if

if it were otherwise, no recovery could be suffered of an advowson or common in gross, or of many other things which would be highly inconvenient.

17. So, where a writ of entry bore date 1 Mar. 7 Eliz. and the return was made *die Lunæ quarta Septimana quadragesimæ proxim. futur.* the said first day of March, being the first week of Lent, 7 Eliz. and upon this it was inferred, that the tenant was not to appear until Monday in the fourth week of Lent, 8 Eliz. which was a long time after the voucher appeared and vouched over. But it was determined by the whole court, that the original writ should be taken as it was written, to be returnable on Monday in the fourth week of the same Lent, 7 Eliz. for it shall be taken (as it is written shortly) in such a manner as to make the recovery good.

Barton's case,
Poph. 100.
Cro. Eliz.
388.

18. A common recovery was suffered, but no writ of entry was filed; in consequence of which, a writ of error was brought: it was moved that it might be examined, whether any writ of entry had been filed or not: but the court denied it, though if it appeared upon record that a

Anonymous
Litt. Rep.
299.

writ had been filed, then they would consider, whether a new writ should be filed or not; and it was said, that if a recovery was exemplified pursuant to the statute 23 *Eliz.* though some part of it was lost, yet it would be aided.

19. By a rule of the court of Common Pleas made *Trin. 30 Geo. 3.* "It is ordered
"that from and after the first day of *Mich.*
"*Term*, then next ensuing, in every common recovery wherein the vouchee or
"vouchers shall personally appear at the
"bar of that court for the purpose of suffering such recovery, the writ of entry
"shall be sued out, and produced at the
"time of the recording of the vouchee's
"or voucher's appearance at bar, at the
"foot of the *Præcipe* in such recovery."

H. Black. R.
vol. 1. 526.

CHAPTER III.

Of the Tenant to the Præcipe.

20. **A** Common recovery being a real action carried on through all its forms, it is absolutely necessary, that the person against whom the writ of entry is brought, should have an estate of freehold, by right or by wrong, in the lands to be recovered, either at the time when the writ is purchased, or at least before judgment is given; because, if he has not the freehold, it will not be in his power to restore the lands as the writ directs. And in common recoveries, there is an additional reason; because, as the demandant can recover nothing against the tenant, unless the tenant has the freehold, so the tenant can have no recompence in value against the vouchee, in consideration of what he has lost; for until the demandant sues out execution against the tenant, the tenant cannot have execution against the vouchee; and if the tenant has nothing in the land, no execution can be sued against him, nor

Reasons why the Tenant to the Præcipe should have the freehold.
Pigot 28.

Booth 3.

can any recovery in value be had over; consequently there will be no recompence to bind him, and the recovery will be no bar.

21. If the tenant to the *præcipe* acquires the freehold at any time before judgment is given, it will be sufficient.

Lacey v. Williams, Rep. temp. Holt. 614.
2 Salk. 568.
1 Ld. Raym. 227. 475.
Carth. 472.

Thus in ejectment it appeared by a special verdict, that the tenant to the *præcipe* had not acquired the freehold until after the *teste* of the writ of *summoneas ad warrantizandum*; so that he was not seised of the freehold at the return of the writ of entry.

The Court of Common Pleas determined that the recovery was valid. A writ of error was brought in the Court of King's Bench, and it was contended on the part of the plaintiff in error, that the recovery was void, because although a common recovery was a common assurance, yet it had forms peculiar to itself which ought to be observed. In supposition of law, the tenant ought to have the lands at the time of suing out the writ, otherwise he cannot render them as the writ supposes. The court supposes the tenant to be seised of the lands, otherwise to what purpose
are

are the lands demanded from him? The voucher supposes that the tenant has seisin of the lands, for it would be absurd that the tenant should vouch another person to warrant lands to him which he has not.—On the other side it was argued, that in all cases of adversary actions, although the person against whom the writ was brought was not tenant at the time of the *teste*, but became tenant before the return, it was sufficient. If the tenant to the *præcipe* was not seised at the return of the writ, he might avoid it by pleading non-tenure; if instead of that he vouched over, then he admitted the writ to be good as to himself, but still the vouchee might counterplead the tenancy; if he did not, the recovery would be good by estoppel against the parties to it; however, in such a case, the tenant to the *præcipe* could not recover over in value, because he had lost nothing; but if the tenant acquired the lands after the voucher, and judgment was given against him, it would bind the land; and as the tenant had lost the land, he would recover in value against the vouchee: so that the recovery would be effectual.

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This being the law in adversary suits, it ought certainly to be so in common recoveries, which the judges take notice of as common assurances, and which they will always support, if possible.

It was adjudged that this recovery was good; and Lord Chief Justice *Holt* said, the general rule was, that if the tenant to the *præcipe* acquired the freehold at any time before the judgment was given, it was sufficient, because it cannot then be said, that the recovery was had against a person who had nothing in the lands; and it was not enough in a counter-plea of voucher to say, the voucher had nothing in the lands at the time of the voucher, without adding *nec unquam postea*; therefore a writ might be made good by a subsequent purchase, so might a voucher; which was the more reasonable, because the demandant might have a good cause of action, although the tenant had not the land when he commenced his suit; so that it was sufficient in law if the tenant had the land to render at any time before judgment.

Sambourn v.
Belke & Show.
347. S. P.

The stat. 14 Geo. 2. which will be stated at the end of this chapter, has obviated all objections

objections of this kind against the tenant to the *præcipe*.

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22. If the tenant to the *præcipe* has the freehold at the time when judgment is given, although his estate be afterwards defeated, yet the recovery will be good.

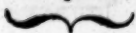
Thus where land was given to an alien in tail, remainder over to another in fee: the alien suffered a common recovery, and died without issue.—All this was found by office, and it was contended, that the alien was not tenant to the land when the recovery was suffered; but the court held the contrary, that the recovery was good.

Anon. 4 Leon.
84 Goldsb. 82.

23. It has sometimes been doubted in practice, whether upon the death of a person whose widow is intitled to dower, the heir can suffer a recovery before assignment of dower. No case of this kind has ever, I believe been determined; but it follows from the principles laid down by *Ch. B. Gilbert*, that such a recovery would be good, for he says the law casts the freehold on the heir, immediately upon the death of the ancestor; but the law does not

Gilb. Ten.
26.

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Vide Lit. f.
393.

Lincoln Col-
lege case, 3
Rep. 58.

Griffin v.
Stanhope.
Cro. Ja. 544.

1 Vent. 358.
Paulin v.
Hardy. Skin.
3. 63. Shep.
Tou. 41.

Marquis of
Winchester's
case,
3 Rep. 1.

not cast dower on the wife, she takes it by her own act. It is true that when the widow is endowed, the possession that the law casts on the heir is avoided, and the widow is considered as being in, from the death of her husband; but still the heir had the freehold until dower was assigned, which is sufficient to support the recovery.

24. Although a person has acquired the freehold by disseisin, yet he will be a good tenant to the *præcipe*; and in all cases where the validity of a common recovery is contested, the court will suppose that there was a good tenant to the *præcipe*, if nothing appears to the contrary.

25. If a writ of entry is brought against the tenant of the freehold and a stranger, the recovery will be valid, for the recompence in value will go to the person who has really lost the estate.

26. If there be two joint-tenants of a manor, and a writ of entry of the whole manor is brought against one of them, on which a common recovery is suffered, it will only be good for the moiety of the person against whom the writ was brought; but

but as to the other moiety, it will be void for want of a tenant to the *præcipe*.

27. As it is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold, it follows, that no person who has not an estate of freehold, can of himself suffer a common recovery, because he cannot convey a freehold, to the person against whom the writ is to be brought.

Thus where a lessee, *pour autre vie*, made a lease for sixty years, and died, in the life-time of the *cestui que vie*, the person in reversion, being tenant in tail, suffered a common recovery, which was held erroneous for want of a good tenant to the *præcipe*; for upon the death of the tenant, *pour autre vie*, the freehold was cast on the tenant for years; so that he, or some person claiming under him, ought to have been tenant to the *præcipe*.

Keb. 735.
785.

28. So where lands were limited to Sir Robert Dormer for ninety-nine years, if he should so long live, remainder to trustees and their heirs, to preserve contingent remainders, remainder to his first and other sons

Dormer v.
Parkhurst,
3 Atk. 135.
4 Brown 405.

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sons in tail male. Sir *Robert* having issue a son, *Fleetwood Dormer*, they both joined in levying a fine to make a tenant to the *præcipe*, and then suffered a common recovery. The principal question in this case was, whether the freehold passed to the trustees, there being a considerable error in the words by which the remainder was limited to them? And the court having determined, that the freehold did pass to the trustees, they concluded that the recovery was void; for if it was considered as the recovery of *Robert Dormer*, it was void, because he being only tenant for years could not give a freehold to another, without which there could not be a good tenant to the *præcipe*; for, to make him so, he must have a freehold in him. And taking it as the recovery of *Fleetwood*, the son, it could not be good, the freehold being in the trustees, and not in him, he having only a remainder expectant on the determination of their estate. And as to the fine levied by *Robert Dormer* and *Fleetwood*, it stood thus: considered as the fine of *Robert*, it was void for want of a freehold, it being settled beyond all doubt, that a fine by tenant for years, operates nothing and was absolutely void: and considered as
the

the fine of *Fleetwood*, it was equally so for want of a freehold in him, it being equally clear that none can levy a fine but he who has a freehold in possession.

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29. It has been long settled, that a devise to executors for payment of debts, and until debts are paid, only gives the executors a chattel interest in lands thus devised, and therefore does not prevent the disposal or descent of the freehold; so that if after such a devise the testator gives the same lands to a person for life, the freehold will vest in such devisee immediately on the death of the testator, and he will be enabled to make a good tenant to the *præcipe*.

1 Inst. 42. a.
8 Rep. 96. a.

30. So if a testator gives his executors full power to receive the mesne profits of his estates in a particular place, upon trust to pay his debts, and afterwards devises those estates to a person for life, the freehold will become vested in such devisee on the death of the devisor, and he may make a good tenant to the *præcipe*.

Thus where Sir *Michael Armyne* being seised in fee of several estates in the counties of *Huntingdon, Lincoln, &c.* made his will, and

Carter v.
Barnadiston.
1 P. Wms.
505.
2 Brown. 1.

Recoveries.

and thereby desired, that his executors would take care to see all his debts and legacies paid by making sale of his personal estate; and as his debts were great, he devised to his executors all his manors and lands of *Cherry Orton* and *Botolph Bridge*, to be by them sold for the most that could be got, and the monies arising from such sale disposed of in the payment of his debts and legacies. And lest both his personal estate and the monies to arise from such sale should not be sufficient, the testator gave his executors full power to receive the mesne profits of his whole estate, lying in *Pickworth* and *Willoughby*, in the county of *Lincoln*. The testator then devised the said manors of *Pickworth* and *Willoughby*, after such time as his debts and legacies should be paid by the rents and profits thereof, to *Evers Armyne*, Esq. for his life, without impeachment of waste; and in case the said *Evers Armyne* should have any issue male, then to such issue male and his heirs for ever, and after the decease of the said *Evers Armyne*, in case he left no issue male, then after such time as his debts and legacies were fully paid, he devised the manor of *Pickworth* to *Thomas Style* in fee. *Evers Armyne*, the devisee, having got into possession

session of the said manors of *Pickworth* and *Willoughby*, suffered a common recovery of them before the debts were paid, and declared the uses thereof to himself in fee.

This case having been heard in the House of Lords, the judges were directed to give their opinions, "Whether the estate for life was vested in *Evers Ar-myne* at the time of the recovery, before all the debts were paid, so that he could make a good tenant to the *præcipe*?" And the Lord Chief Justice of the court of Common Pleas, in the name of all the judges who had consulted together, delivered their unanimous opinion, "That the estate for life was vested in *Evers Ar-myne* at the time of the recovery."

31. It is not only necessary for a person, who suffers a common recovery, to have an estate of freehold in the lands, but it is also necessary that it should be an estate in possession; for the person against whom the writ is brought must be actual tenant in possession of the freehold, at the time when judgment is given; so that it frequently happens, that persons who are intitled to estates of inheritance in lands, are,
notwith-

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notwithstanding, disabled from suffering common recoveries of them, in consequence of their not having a freehold in possession.

This happens in two instances: 1st. where the lands are let out on leases for lives; 2dly, when there is an estate for life prior to their estate of inheritance.

Where an estate is let on leases for lives they need not now be surrendered.

1 Burr. 115.

32. Before the statute of *quia emptores*, subinfeudations, whereon rents and services were reserved, did not prevent a writ of entry from lying against the freeholder of the feignory; when common leases to farmers for one or more life or lives reserving rent came in use, they resembled subinfeudations, and therefore ought not to have prevented the *præcipe* from being brought against the owner of the freehold under which the leases were granted; but it was, however, thought necessary, and became usual, for the person who intended to suffer a recovery to get conditional surrenders from the tenants for lives, in order to become seised of a freehold in possession, and be thereby enabled to make a good tenant to the *præcipe*.

33. This practice being productive of several inconveniences; the lessees for life being sometimes unwilling, and frequently unable, from want of age or understanding, to make such surrenders, and it being in some instances doubtful in whom such leases, for lives were vested. The statute of 14 Geo. 2. c. 20. Reciting that several leases had been and were likely to be made of honours, castles, manors, lands, tenements, and hereditaments, for one or more life or lives, under particular rents thereby reserved and to be reserved, and that procuring surrenders of such freehold leases or the tenants thereof to join, frequently occasioned great trouble, difficulty and expence to tenants in tail. It is therefore enacted *s.* 1. " That all common recoveries, suffered, " or to be suffered, in his majesty's court of " Common Pleas at *Westminster*, or in any " other court of record in the principality " of *Wales*, or in any of the counties palatine, or in any other court having jurisdiction of the same, of any honours, castles, manors, lands, tenements, or hereditaments, without any surrender or surrenders of such lease or leases, or without the concurrence, or any conveyance or assurance

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“ furance from fuch leffee or leffees, in or-
 “ der to make good tenants to the writs of
 “ entry, or other writs whereupon fuch re-
 “ coveries have been, or fhall be had or
 “ fuffered, fhall be as valid and effectual in
 “ law, to all intents and purpofes whatfo-
 “ ever, as if fuch leffee or leffees, or any
 “ other perfon or perfons claiming un-
 “ der him, her, or them, had conveyed,
 “ or joined in conveying, or fhall convey, or
 “ join in conveying, a good eftate of free-
 “ hold to fuch perfon or perfons as has, or
 “ have been, or fhall become tenant or te-
 “ nants to fuch writs of entry, or other writs,
 “ whereupon fuch common recoveries have
 “ been, or fhall be fuffered.”

*But Perfons
 having a prior
 Eftate for Life
 muft join.*

34. Although this ftatute has made the furrender of leafes for lives unnecessary, yet it does not extend to eftates for life which are prior to the eftate of which a recovery is intended to be fuffered.—Such eftates muft therefore ftill be furrendered to the perfon againft whom the writ of entry is brought, for this cafe is exprefsly excepted in the ftatute 20 Geo. 2. c. 20. f. 2. by which it is provided, “ That nothing in that act
 “ contained fhould extend, or be conftrued
 “ to extend, to make any common recove-

“ries valid and effectual in law, unless the
 “person or persons intituled to the first
 “estate for life, or other greater estate (in
 “case there was no such estate for life in
 “being) in reversion or remainder, next
 “after the expiration of such leases, has or
 “have, by some lawful act or means, con-
 “veyed or assured, or joined in conveying
 “or assuring, or shall, by some lawful act
 “or means, convey or assure, or join in
 “conveying or assuring an estate for life, at
 “the least, to such person or persons
 “as has or have been, or shall become
 “tenant or tenants to the writs of entry, or
 “other writs whereupon such common re-
 “coveries have been or shall be suffered.”

35. The prior estate for life ought to be
 surrendered to the person who has the re-
 mainder or reversion before he makes a
 tenant to the *præcipe*; but if the surrender
 is made after the execution of the deed, by
 which the lands are conveyed to the person
 who is to be tenant to the *præcipe*, it must
 then be made to him, otherwise it will be
 void, because the person who is to suffer
 the recovery has then no reversion in him
 for the surrender to operate upon.

Pigot 50.

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*A Surrender
by the Tenant
for Life is
sometimes
presumed.*

36. Common recoveries having been long considered as common assurances of lands, and in the nature of conveyances by consent, the judges have, in consequence of particular circumstances, sometimes presumed that the tenant for life had surrendered his estate, although a surrender was not actually proved.

37. Thus where the possession has accompanied a recovery for a long time, the court will presume a surrender by the tenant for life to make a tenant to the *præcipe*.

Green v.
Froud.

3 Keb. 310.

1 Mod. 117.

1 Vent. 257.

In an ejectment upon a trial at bar for lands held in ancient demesne, a recovery in the court of ancient demesne was produced, which had been suffered a long time before, and the possession had gone accordingly. It appeared, that part of the land was leased for life, and the recovery was by the person in reversion; so that there was no tenant to the *præcipe*. But the court said, that as the possession had gone with the recovery for so long a time, they would presume a surrender; as in an appropriation of great antiquity, a licence has been presumed, although none appeared.

38. So

38. So where collateral evidence has been given of a surrender by a tenant for life, the recovery has been deemed good.

Upon a trial at bar, the lessor of the plaintiff claimed under an old intail in a family settlement, and part of the estate appeared to be in jointure to a widow at the time her son suffered a common recovery. The defendant who claimed title under the recovery not being able to shew a surrender of the mother's life estate, it was insisted that there was no tenant to the *præcipe*, as to that part; so that the remainder, which the lessor of the plaintiff claimed, was not barred.

Warren ex
dem. Webb
v. Greenville
2 Stra. 1129.

To obviate this objection, it was insisted by the defendant, that after so long a time had elapsed, a surrender should be presumed according to the doctrine laid down in the case of *Green v. Froud*; and to fortify this presumption, they offered to produce in evidence the debt book of Mr. *Edwards*, an attorney at *Bristol*, then a long time dead, wherein he had charged 32 *l.* for suffering the recovery, two articles of which charges were, for drawing a surrender of the

mother's estate 20 s. and for ingrossing two parts thereof 20 s. and that it appeared by the book, that the bill had been paid. This being objected to as improper evidence, the court were of opinion that it should be allowed; for it was a circumstance material upon the enquiry into the unreasonableness of presuming a surrender of the widow's life estate, and could not be suspected of having been done for this purpose. If *Edwards* had been living, he might undoubtedly have been examined; and after his death this was the next best evidence, and it was accordingly read; after which the court declared, *that without this circumstance they would have presumed a surrender, and desired it might be taken notice of, that they did not require any evidence to fortify the presumption after such a length of time.*

39. But where there is no reason or ground to found a presumption, that the tenant for life had surrendered his life estate, and where the possession has *not* gone with the recovery, the court will not presume that such a surrender was made.

Goodtitle ex
dem. Bridges
v. the Duke
of Chandos,
2 Burr. 1065.

G. R. Bridges being tenant in tail of a considerable estate, whereof he was in possession

session of some part, the remainder being held by a widow, on whom it had been settled for life, for her jointure, and who was then in possession of it, suffered a common recovery of the whole estate tail, using such descriptions as were sufficient to include the whole estate tail, and then settled it on the Duke of *Chandos*.

Upon the death of *G. R. Bridges*, the Duke of *Chandos* entered into possession of all the estate, except the part of which the widow was in possession, and upon her death, he took possession of that part also.

An ejectment was brought against the Duke of *Chandos* by *James Bridges* the reversioner, for that part of the estate tail whereof the widow was in possession, at the time when the recovery was suffered; upon the ground that there was no surrender of the widow's life estate: the Duke of *Chandos* being unable to give any sort of evidence of an *actual surrender*, his counsel insisted at the trial that a surrender of the widow's life estate ought to be *presumed* after so long a time, even though they should not give any evidence whatsoever of such a surrender; but Mr. Justice *Noel*,

who tried the cause, was of opinion, that a surrender of the tenant for life could not be presumed, when no sort of evidence had been given to make such a fact in the least probable; and when the possession had not gone with the recovery, but had continued in the tenant for life until the time of bringing the ejectment, and accordingly he directed the jury to find for the plaintiff.

Ante f. 37,
38.

Upon this direction a motion was made for a new trial. The defendant's counsel relied on the cases of *Green v. Froud*, and *Warren ex dem. Webb v. Grenville*, mentioned in the preceding pages.

On the other side it was argued for the plaintiff, that there could be no presumption without some facts to ground it upon. In the case of Mr. *Grenville*, there was a very strong presumption arising from the articles in the attorney's bill, the proof whereof the court allowed to be entered into, and received satisfaction from it; and that there was no case where a presumption of a surrender had been raised, without possession accompanying and following the recovery.

In the case of *Froud v. Green*, upon which Mr. *Grenville*'s case was said to be grounded, there was a possession which had followed the recovery for a long time, and that was the very reason there given for the courts forming the presumption which they then made. That the rule in all the cases cited, and in all cases of this kind, must in reason and common sense, necessarily be understood to relate to the length of time which has elapsed *since the tenant in tail's coming into possession*, and not to the length of time since the suffering of the recovery. The out-standing life estate, during the life of the widow, forms the strongest presumption that she did not surrender the estate; besides, it did not at all appear from the judge's report that G. R. *Bridges*, the tenant in tail in possession of all the *rest* of the estate, and of which he had power to suffer a recovery, ever meant or intended to suffer a recovery of these settled lands, which he had no power to do; he had other lands upon which the recovery operated, and there was no reason to imagine that he meant to include these lands, or that he ever attempted to procure a surrender of them.

Lord *Mansfield*.—"I was counsel in the case of Mr. *Grenville* reported by *Strange*,
" and

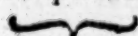
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“ and I remember very well that the point
“ of evidence was strongly litigated ; the at-
“ torney, who had been concerned in the
“ transaction of the common recovery, was
“ one *Edwards of Bristol*, who had been then
“ long dead : the entry in his bill book was
“ made at the time of the transaction, and a
“ receipt had been given upon the bill which
“ contained the articles *for drawing and en-*
“ *grossing the surrender* ; so that there was po-
“ sitive proof in that case of an actual surren-
“ der : and there the jointress had been dead
“ *a vast number of years*, and the person who
“ suffered the recovery, and his son after
“ him, had both of them, during their re-
“ spective lives, sufficient opportunity to
“ have set it right after they came into pos-
“ session, if they had known or suspected it
“ to have been defective, which certainly
“ formed a presumption that it was regular,
“ and not defective.—I am confident that
“ all the court did, or intended to do in
“ that case, was only to take care that it
“ should be understood, that they did not
“ mean to shake the authority of any one
“ case which had been founded upon pre-
“ sumption, and that they would not require
“ positive proof of a surrender, in any case,
“ where

“ where there was sufficient presumption of
 “ it. Sir *J. Strange*’s report is incorrect,
 “ considered as a foundation for a principle
 “ or rule of property, though it might be
 “ enough to serve the taker of such a note
 “ for a memorandum to refresh his own re-
 “ collection; if that be so, then consider the
 “ present case upon principles. There are
 “ two sorts of presumption; one, a pre-
 “ sumption of law, and not to be contradict-
 “ ed; the other a species of evidence, which
 “ latter must have a ground to stand upon;
 “ something from whence it is to arise.

“ It is now fully settled and established,
 “ that a tenant in tail may, if he pleases,
 “ either turn his estate tail into a fee simple,
 “ or alienate it for his own benefit, by suf-
 “ fering a common recovery; but he must
 “ have a sufficient estate, and power to
 “ qualify him for suffering such a reco-
 “ very; he must either be tenant in tail
 “ in possession, or he must have the con-
 “ currence of the freeholder, who claims
 “ under the same settlement.

“ This principle is adhered to by the Ante f. 33.
 “ statute 14 *Geo. 2. c. 20.* the tenant for 34.
 “ life, whose consent is necessary to the
 “ tenant



“ tenant in tail in remainder, to enable
 “ him to cut off the intail, is not the lessee
 “ of the land under a beneficial lease, but
 “ the original tenant for life, claiming un-
 “ der the same family settlement, and hav-
 “ ing a life estate settled upon him prior,
 “ in order of succession, to the other’s re-
 “ mainder in tail.

“ Where a person has a power to suffer
 “ a recovery, and thereby bar his estate
 “ tail, *omnia præsumuntur rite & solemniter*
 “ *acta*, until the contrary appears; and it
 “ is reasonable that it should be so: but if
 “ the contrary appear, then there is an end
 “ of such presumption.

Keen ex dem.
 Earl of Portf-
 mouth v.
 Earl of Ef-
 singham,
 2 Stra. 1267.

“ This was the case of the Earl of *Suf-*
 “ *folk*’s recovery, upon a trial at bar in this
 “ court, in *Easter* term, 1747; there the
 “ contrary *did* appear, and the presump-
 “ tion was thereby destroyed; there were
 “ blundering deeds actually produced,
 “ which appeared clearly to be wrong;
 “ and it was manifest, upon the evidence
 “ disclosed, that there was not a good
 “ tenant to the *præcipe*: it was therefore
 “ impossible for the court, in that case, to
 “ presume that there was a good tenant *to*
 “ the *præcipe*.

“ But

“ But if a man has power to suffer a recovery, that is a solid and reasonable ground for presuming that all was done rightly and regularly, unless something to the contrary shall appear.

“ Where the freeholder is a trustee for the tenant in tail himself, and under his power and direction, it is a reasonable and just cause for presuming, that every thing was regularly transacted; so where the person or persons interested to object against the validity of a recovery have had opportunity to make objections to it, but instead of doing so, have acquiesced under it, and not disputed its validity, this forms a presumption that all was right and regular. But there can be no presumption in the nature of evidence, in any case, without something from whence to make it, some ground to found the presumption upon; whereas here is absolutely nothing from whence to presume a surrender: the single pretence to any the least ground of presumption, in the present case, can only be this, that no tenant in tail in remainder would suffer a recovery, without first getting a surrender of the life estate,

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“ estate, in order to make it valid and ef-
 “ fectual. But even that ground, slight as
 “ it is, will not hold in the present case;
 “ for it does not at all appear, upon the
 “ report of the judge, that *G. R. Bridges*,
 “ who suffered the recovery in question,
 “ had the least intention whatsoever to in-
 “ clude those particular lands in the reco-
 “ very which he suffered, and which he
 “ had full power in himself alone to suffer,
 “ of all the rest of the estate whereof he
 “ was at that time tenant in tail in posses-
 “ sion. He was then in possession of the
 “ manor of *Keynsham*, and of other lands in
 “ *Keynsham*, sufficient to answer the gene-
 “ ral descriptions used in the recovery, he
 “ must probably know, or have been in-
 “ formed by his counsel or agents, that he
 “ had no such power over the settled parts,
 “ without obtaining a surrender of the life
 “ estate; he might perhaps be satisfied that
 “ he could not obtain a surrender of the
 “ life estate, or he might have attempted
 “ to obtain it, and failed in such attempt.

“ If the mere fact of a remainder-man
 “ in tail’s suffering a recovery was *alone*
 “ sufficient to ground a presumption of a
 “ surrender of the life estate; it would be
 “ in

“ in the power of every remainder-man in
 “ tail to bar the estate tail, notwithstanding
 “ the tenant for life should absolutely re-
 “ fuse to join with him in suffering a re-
 “ covery; it is therefore necessary that
 “ there should be facts and circumstances
 “ to ground a presumption of such a sur-
 “ render upon: whereas in the present
 “ case it is so far from being reasonable
 “ to presume that there was such a sur-
 “ render from the jointress, that there are,
 “ on the contrary, many reasons to induce
 “ a suspicion that there was not such a sur-
 “ render; she might have more regard for
 “ *James Bridges* than for *George*; she might
 “ think it wrong or unkind to hurt the re-
 “ versioner, or even whim and peevishness
 “ might prevent her from interfering:
 “ there is no defining the various reasons
 “ she might have to hinder her from sur-
 “ rendering her life estate for such purpose.
 “ Mr. *George Bridges* being therefore only
 “ tenant in tail in remainder, and the life
 “ estate under the same settlement, still
 “ subsisting at the time of his suffering the
 “ recovery, it is clear that he had no power
 “ to alien or to bar. And there is nothing
 “ from whence to presume a surrender of
 “ the life estate to enable him to do so.

“ If

“ If he had any power to bar or alien,
 “ then indeed no presumption could have
 “ been too large, in order to prevent slips
 “ in legal forms and methods of convey-
 “ ance, and to effectuate the intention of a
 “ person who had a legal right to do such
 “ an act.

“ No argument can be drawn in the pre-
 “ sent case from length of time, because
 “ the ejectment was brought immediately
 “ upon the death of the jointress.”

The court were all clear and unanimous,
 that there was no colour for objecting to
 the judge's direction.

At the sitting of the court the next
 morning, Lord *Mansfield* mentioned this
 case again: he said he had looked into his
 own notes of the case of *Warren*, on the
 demise of *Webb*, against *Grenville*, where
 the recovery was of forty years standing:
 and the court did lay it down in that case,
 “ that, after a recovery of forty years
 “ standing, they would, without any other
 “ circumstances, presume a conditional sur-
 “ render to have been made by the tenant
 “ for life;” and they relied upon 1 *Ventr.*

257, and Mr. *Piggot's* book, p. 41. But his lordship observed, that there are other circumstances, in the case in *Ventris*; and there is nothing in *Pigot*, to justify this general position. And he added, that in the case then at the bar, the court did (as he had taken it down) admit as evidence the entry in the attorney's book, as has been mentioned.

He said, he was rather more strongly of opinion than he was yesterday, "that in the present case, there was no ground for a presumption that there was any surrender by the tenant for life." Here were two particular reasons against making any such presumption. One was, that there did not appear to have been any intention in the remainder-man in tail, to suffer a recovery of these particular lands: the other, that here was no possession at all, under this recovery; but, on the contrary, the ejectment was brought, and the validity of the recovery put into litigation, immediately after the death of the tenant for life.

If the eldest son, who has a remainder in tail under a family settlement, should privately suffer a common recovery, and

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his father live many years afterwards; it might as well be argued, "that length of
"time from the date of the recovery
"should induce a presumption, that the
"father surrendered his estate for life."

And his lordship declared himself as clear, that if there had been a long possession by the tenant in tail after the death of the tenant for life; though such a possession might be ascribed to the entail, the presumption ought to have been made, upon the ground of acquiescence under it, and the probability arising therefrom, "that
"the parties knew that the recovery was
"not defective."

Rules of property ought (his lordship said) to be generally known, and not to be left to loose notes, which rather serve to confound principles, than to confirm them. He therefore proposed to have a conference with all the judges upon this case: which proposal did not arise, he said, from any doubt about the matter; (for he was more confirmed in his opinion, than he was yesterday;) but for the sake of having so considerable a rule of property settled, and of rendering it notorious and publick.

For

For which purpose, he (at first) ordered it to stand over till next term: but afterwards, upon it's being agreed by all the parties, that in Mr. *Grenville's* case, there was a great number of years during which the tenant in tail had been in possession after the death of the tenant for life; and upon the now defendant's counsel candidly declaring "that they themselves were fully "satisfied with the present opinion of the "court;" he retracted his proposal, and said he would not trouble the judges with it, since the counsel were so candid as to acquiesce entirely in the opinion that the court had already intimated.

His lordship further added, that he would have it understood, that possession of the tenant in tail, after the death of the tenant for life, does leave a ground of presumption, "that there was a surrender." But in the present case, there was no possession after the death of the tenant for life: the ejectment was brought immediately.

40. Where, after a recovery the deeds were suppressed by the tenant for life, so that it could not be made out whether he had surrendered his estate for life to the tenant

Gartside v.
Ratcliffe,
1 Cha. Ca,
292.

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to the *præcipe* or not, it was decreed for the recovery, without allowing a trial at law; for where deeds are suppressed *omnia præsumuntur*.

41. Where a person has only a trust estate of freehold, he may notwithstanding make an equitable tenant to the *præcipe*, which will enable him to suffer what is called an equitable recovery, of which the effect will be stated hereafter.

Of the different Conveyances by which a Tenant to the Præcipe may be made.

42. When the person who means to suffer a common recovery is in actual possession of the freehold, he may convey that freehold to any stranger, for the purpose of making him tenant to the *præcipe* by fine, by feoffment, by bargain and sale inrolled, or lease and release.

Fine.

43. It is sometimes thought expedient to make a tenant to the *præcipe* by fine, not only on account of the notoriety of this species of assurance, but because even an erroneous fine gives such an estate to the cognizee, as is sufficient to make him a good tenant to the *præcipe*. And Sir M. Hale said that the cognizee of a fine *o&T*.

3 Keb. 597. *purif.* would be a good tenant to the *præcipe*

cipe in a recovery suffered the same day, and the court would presume a priority to support a conveyance.

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Thus, where a writ of error was brought against a person who was made cognizee of a fine, in order to become tenant to the *præcipe*, and after the recovery had been suffered, the fine was reversed for error; yet the recovery was held good, because there was a good tenant to the *præcipe* at the time.

Lloyd v.
Evelyn,
2 Salk. 568.

44. But if the fine was in itself absolutely void, as if the person who levied it had no estate of freehold in the land, then the recovery would be void, because in that case the fine passed no estate.

Thus in the case of *Dormer v. Packhurst*, which has been already stated, a fine was levied by a tenant for years, and a remainder man in tail to make a tenant to the *præcipe*, and it was determined that the recovery was void; because none of the parties to the fine had an estate of freehold in the lands.

Ante f. 28.

45. If a fine be levied to a lessee for years of the same land for the purpose of

1 Vent. 195.
1 Mod. 107.

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making him tenant to the *præcipe* in a common recovery, the term for years will not be merged by the fine: for in the third section of the statute of Uses, 27 *Hen.* 8. there is a saving to all persons and their heirs, who shall be seised to any use, of all such former right, title, &c. as they had to their own use, in any manors, lands, &c. whereof they shall be seised to any other use.

Ferrers v.
Carlton,
Cro Jac. 643.
2 Roll. R.
245.

Thus where *A.* demised lands to *B.* for a term of years, and afterwards the lessor by bargain and sale inrolled and fine, conveyed the same lands to the lessee and others and their heirs, to the use of them and their heirs, to the intent that a common recovery should be had and suffered against them with voucher of the lessor, and that he should vouch over the common vouchee, to the use of a stranger; all which was done accordingly. The question was, whether the term for years was merged, and it was determined that the term still existed, for although it was merged by the union of estates until the recovery was suffered, yet when that was done, the uses thereof being guided by the bargain and sale, it was the same as if there had been
no

no conveyance; it being within the equity and intention of the saving in the third section of the statute of Uses. For the intention of that statute was not to destroy prior estates, but to preserve them; and it was agreed by the whole court, that if a fine or feoffment had been levied or made to the lessee for years, his term would not have been thereby extinguished. It was objected that the bargain and sale and fine were to the use of the lessee for years, otherwise he could not have been tenant to the *præcipe*, and therefore the saving in the statute of Uses did not extend to this case; but it was answered and resolved, for the former reasons, that the term was saved by the equity of the statute.

46. It is a well known principle of law, that where a fine is levied without any consideration or declaration of use, the use and legal estate immediately result to the cognizor of the fine; so that the cognizee has only a seisin of an instant; in consequence of this doctrine, where a fine was levied, in order to make a tenant to the *præcipe*, and a writ of entry was brought against the cognizee of the fine, on which the common recovery was suffered; it was doubted

Although no Use be declared on a Fine, yet it will be sufficient.

3 Keb. 113.

Pigot 52.

whether such a recovery was good; for as no use was declared on the fine, it was said that the use and estate immediately resulted back to the cognizor, so that the cognizee had no estate of freehold when the writ of entry was brought, nor ever afterwards. Mr. *Pigot* held, however, that such a recovery would be good; for, at common law, if a fine was levied without consideration, as in a fine there needs none, the cognizee was tenant to all writs, until the statute of pernors of profits, and the statute of Uses. And although, since the statute of Uses, the use results back when no use is declared, yet the intent of the parties always guided the use, and there could be no resulting use against the express intention of the parties; so that whenever the use results, it is because the parties intend it.—Now in a case of this kind, the evident intention of the parties is to make a tenant to the *præcipe*, which appears upon the record, by the writ of entry being brought against the cognizee; and therefore he must have such an estate as will make him a good tenant to the *præcipe*.

These principles are fully established in the following case:

Tenant

Tenant in tail, remainder in tail, with remainder over, the tenant in tail levied a fine *sur cognizance de droit come ceo, &c.* to J. S. and his heirs, in order to make him tenant to the *præcipe*, but no use was declared on the fine. Seven years afterwards a writ of entry was brought against J. S. who vouched the cognizor of the fine, and a common recovery was thus regularly suffered. The question was, whether J. S. had an estate of freehold in him when the recovery was suffered?

Lord Altham
v. Lord
Anglesey,
Gilb. Rep. 16.
Salk. 676.
Cases temp.
Holt. 733.
11 Mod. 210.

It was contended, that although the legal estate passed by the fine to J. S. yet, as no use was declared on the fine, the use resulted back to the cognizor; so that J. S. had no estate in the lands at the time when the recovery was suffered, and therefore was not a good tenant to the *præcipe*.

But it was held by Lord Chief Justice Holt, and all the other judges, that the recovery was good, for when a fine was levied, or a feoffment made, to a man and his heirs, the estate was in the cognizee or feoffee, not as an use, but by the common law, and might be averred to be so; and as in this case the intention of the fine plainly

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plainly appeared to be for the purpose of making a tenant to the *præcipe*, the use and estate should be allowed to have vested in *J. S.* so that the recovery was well suffered.

1 Stra. 17.

This point was again determined by the court of King's Bench in *Mich. 3 Geo. 1.*

Husband seised jure uxoris, may make a Tenant to the præcipe without his Wife's joining him in a Fine.

47. It has been often doubted whether a husband seised *jure uxoris* could make a tenant to the *præcipe* of his wife's land, for the purpose of suffering a common recovery, without the wife's joining him in a fine. This doubt probably arose from the words of Lord Talbot, in the case of *Robinson v. Cummins*, as reported in *Cases tempore Talbot*, 167, for there his lordship is made to say, "it hath been said that a feme, tenant in tail, and her husband, cannot make a tenant to the *præcipe* without a fine; but whatever may be the case, where a husband is merely seised in right of his wife, is not necessary for me to determine, because in this case Sir *J. Robinson* did by his intermarriage become intitled to an estate by the curtesy, and therefore he alone, without his wife's joining, might have made a good tenant to the *præcipe*."

In an opinion given by the late Mr. *Booth* on this subject, he observes, that this report of Lord *Talbot's* argument is incorrect; that he himself was present at the hearing of that case, and had a very full note of it; and that Lord *Talbot's* words were these: "If I should lay it down as a
" rule, that where the wife is intitled to an
" estate tail in possession, her husband and
" she could not make a tenant to the
" *præcipe*, for the docking of the intail
" without a fine, because the law is sup-
" posed to appoint no other method, by
" which a woman under coverture can con-
" vey her freehold, but by fine, I should
" shake many of the common recoveries
" of the kingdom; for whatever may have
" been the practice of some over-cautious
" conveyancers, yet I believe it hath often
" been held, that the husband alone may,
" by deed only, and without any fine levied
" by the wife, convey a sufficient freehold
" to the grantee, to make him tenant to
" the *præcipe* (a)."

Cases and
Opinions, v.
1. 436. vol.
2. 132.

(a) Mr. *Booth's* account of what Lord *Talbot* said on this occasion, is confirmed by a manuscript report of the case of *Robinson* and *Cummins*, in the possession of Mr. *Butler*, of which he has made mention in a note on the First Institute, 326. b.

This

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1 Inst. 351. a.
Idem 273. b.

This latter opinion seems to be perfectly consistent with the principles of the common law; for Sir *Edward Coke* says, "if a man taketh to wife a woman who is seised in fee, he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to work a re-mitter."

Gilb. Ten.
108.
1 Roll. Ab.
845.

48. It must be the same where a man marries a woman seised in tail, for a feme covert cannot have a seisin distinct from her husband; and on this ground it has frequently been determined, that the husband's conveyance is sufficient to transfer a good estate of freehold during the joint lives of the husband and wife.

Fig. 72.

Mr. *Pigot* was of the same opinion, having laid it down, that a husband, seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, might create an estate of freehold during the coverture, and thereby make a good tenant to the *præcipe*; and there is a case in *Roll's Abridgement*, in which this point was expressly determined.

A hus.

A husband seised in right of his wife for life, remainder in tail to *B.* remainder to *C.* bargained and sold the land to another, against whom a *præcipe* was brought, who vouched him in remainder, and so a common recovery was suffered.—Adjudged that the recovery barred the remainder, because the bargainee was a good tenant to the *præcipe*.

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Roll's Ab.
Tit. Recovery (A) pl. 4.

49. It has been a frequent practice ever since the introduction of common recoveries, to make a feoffment with livery of seisin of the lands, to the person against whom the writ of entry was intended to be brought, it being a common opinion, that a feoffment was the most secure conveyance by which a tenant to the *præcipe* could be made; because if the feoffor was in possession at the time when livery of seisin was made, the feoffment was supposed to pass a good estate of freehold either by right or by wrong; that is by disseisin; but this doctrine has been denied in the following case:

Feoffment.

In an ejectment for lands in *Gloucestershire*, the jury found a special verdict, that Sir *Robert Atkyns*, senior, being tenant for life, with remainder to his first and other sons,

Taylor ex
dem. Atkyns
v. Horde,
1 Burr. 60.
5 Brown 247.

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Anno 1681.

sons, reversion in fee to himself, with a power of appointing a jointure to any after-taken wife, married *Ann Dacres*, and pursuant to his power, limited the lands in question to the said *Ann Dacres* for her life as a jointure.

1708.

Sir *Robert Atkyns*, senior, made his will duly attested, and devised his reversion in fee, expectant on the estate tail, limited to his first and other sons, to Mr. *Atkyns* the lessor of the plaintiff.

1709.

Sir *Robert Atkyns*, senior, died, leaving a son, Sir *Robert Atkyns* junior, who entered on all the estate, except that part which was limited to Lady *Atkyns* for her jointure, on which she entered.

Trin. 1710.

Lady *Atkyns* being in possession of these lands, an ejectment was brought against her in the Common Pleas by *John Philips*, on the several demises of Sir *Robert Atkyns* junior, and *Joseph Walker*, for the recovery of the premises in question, on the ground that Sir *Robert Atkyns*, senior, had no power of appointing her a jointure; and the same was tried at the bar of the court of Common Pleas, when a verdict was found

found for the plaintiff, on which judgment was entered, and a writ of *habere facias possessionem* was sued out and executed; and Sir Robert Atkyns junior, entered into and was in possession of the premises.

Sir Robert Atkyns junior, being thus in possession during the life-time of Lady Atkyns, made a feoffment of the premises, with livery of seisin to James Earle, in order to make him tenant to the *præcipe*, for the purpose of suffering a common recovery, which it was thereby declared, should enure to the use of Sir Robert Atkyns junior, his heirs and assigns for ever.

17 Jan.

1710.

A common recovery was accordingly suffered, in which the writ of entry was brought against James Earle, the feoffee, who vouched Sir Robert Atkyns junior and his wife, and they vouched over the common vouchee. Sir Robert Atkyns junior, continued in possession, from the time of the recovery until November 1711, when he died without issue.

Hil. 9 Ann.

Lady Atkyns, the jointress, brought an ejectment against Robert Atkyns the heir at law of Sir Robert Atkyns junior, for the recovery

Hil. 1711.

covery of her jointure; the cause having been tried at the bar of the court of Common Pleas, and it appearing evidently to the court that Sir *Robert Atkins* senior, had a power of appointing a jointure to Lady *Atkins*, which he had duly executed, and that the former verdict was clearly wrong, a general verdict was given for the plaintiff, on which judgment was entered, and Lady *Atkins* was restored to the possession of the premises, and continued seised of them until the time of her death.

The principal question in this case was, whether the recovery was well suffered? which entirely depended upon, whether *James Earle* the feoffee of Sir *Robert Atkins*, was a good tenant to the *præcipe*.

It was contended, on the part of the plaintiff that the recovery was not well suffered; and to shew that *James Earle* took no estate by the feoffment, which could make him a sufficient tenant to the freehold, to answer the writ in a common recovery, it would be material to consider, first, whether Sir *Robert Atkins* junior, was tenant in tail in possession; and, secondly, supposing him to be only tenant in tail in remainder,

remainder, whether his feoffment conveyed the freehold to *James Earle* by disseisin? As to the first of these questions, if *Sir Robert Atkyns* had been tenant in tail in possession, his bargain and sale, his lease and release, his fine, or his feoffment would have conveyed a base fee; and operating by way of discontinuance, voidable either by the entry or action of the issue in tail, or remainder-man, would have made by discontinuance a sufficient tenant of the freehold; but *Lady Atkyns*, the jointress, was seised of the freehold for life, at the time of making the feoffment, and never joined in conveying an estate to the feoffee, the feoffment therefore being only the act of the tenant in tail in remainder, must either pass an estate by disseisin, or was absolutely void. Then, whether the feoffment conveyed the freehold to *John Earle*, so as to make him a good tenant to the *præcipe* by disseisin, depended, first, on his entry; secondly, on his feoffment. By his entry, he gained no freehold; by his feoffment he conveyed no estate; for as to his entry, it was made under a mistaken judgment in ejectment; for *Lady Atkyns*, the jointress, recovered possession again in ejectment, by which second judgment his title was dis-

affirmed; and as the first judgment was plainly wrong, his entry must be considered as the mere act of tenant in tail in remainder. By the judgment in ejectment, he could recover nothing but the term; the point of that action is that the plaintiff may gain possession under his term. The possession of the lessee being that of the lessor, the way in which it always operates to the lessor's benefit, is, that by obtaining judgment for the possession of his supposed tenant, he is enabled to enter; and having entered, the possession unites with any present freehold in himself, whether it be a particular estate, or an estate in fee according to his right. But in this case, *Sir Robert Atkyns* had no present estate of freehold in himself, he gained only a bare possession, and the freehold still remained in judgment of law, in the jointress who had the right to it; the entry of *Sir Robert Atkyns* under the judgment, must be a lawful entry; whether the sheriff executes the writ and gives possession, or whether the party is his own officer, and executes it for himself by taking possession: it has been held, that the entry is equally lawful in either method, if it putsues the judgment. But his possession being recovered without title, no holding

holding over could gain the freehold; and his entry being lawful, no holding over, though wrongful, could create a disseisin, or change the cause of his possession; so that his conveyances were absolutely void, he having no estate on which a release would operate by way of enlargement, and there being no privity between him and the owner of the freehold.

As to the feoffment of Sir *Robert Atkyns*, it might be considered in two lights. First, as a conveyance operating either by right or by wrong. Secondly, as a conveyance executed with a particular intent of making a tenant to the *præcipe* in a common recovery.

1. As a conveyance, generally, it was not pretended that it could operate by right; it could only then be construed to convey a freehold by wrong. But it was a necessary consequence of the reasoning upon Sir *Robert Atkyns*'s entry, that his feoffment was absolutely void; for where the true owner of the freehold is actually expelled by the tortious entry of the disseisor taking violent possession of the

land, that disseisor has gained an estate of freehold and fee, which will pass by a bare livery on his feoffment, his force gained him an estate by wrong, and his feoffment will convey it. But in this case, the entry and the possession being lawful so long as the judgment was in force, the only wrongful act from which a disseisin could be inferred, was the feoffment. The giving livery upon that feoffment, not followed by any possession of the feoffee, could never make a disseisin in the strict, original, and legal sense; it would be a disseisin merely at the election of the rightful owner of the freehold, and for the sake of his remedy. It was the act of his tenant for years, and the wrongful feoffee was put into possession; the true owner might either accept his rent, and treat him as an under-tenant and assignee of the term, or he might maintain an assize and recover the freehold. If the wrongful feoffor continued in possession by collusion with his feoffee, as in the present case, the true owner was under no necessity to take notice of the feoffment; he was not bound to consider his own tenant as a disseisor, and himself as out of possession, but still had it in his election either to accept his rent,

rent, distrain and bring an action for it, or to proceed in a real action for recovery of the freehold, as in case of a forfeiture. Thus the feoffment of tenant for years, or tenant by sufferance, would make a disseisin for the benefit of his lessor, in respect of that remedy which the lessor might elect to take; but estates in remainder could not be displaced without a tortious entry; and as to such remainders, the feoffment was absolutely void in law.

2. As a conveyance executed with the particular intent to make a tenant to the *præcipe* in a common recovery, it had never yet been determined, that the feoffment of a tenant for years, being also tenant in tail in remainder, perfected by livery upon the land, under colour of lawful possession *eo animo*, to make a tenant of the freehold in a common recovery, would be sufficient to support the judgment in that recovery, and enable him to bar his own and the subsequent estates; if so, then a tenant in tail in remainder might suffer a recovery in every instance, as freely as a tenant in tail in possession, not only without the concurrence of the immediate owner of

the freehold, by his joining in it as an essential party, or surrendering his estates, but even without asking his consent, or giving him any notice. By collusion with the tenant for years, by secret practices, to take advantages of a vacant possession, when the tenant of the freehold was absent from his house or land, he might execute a feoffment, and then suffer a common recovery, to anticipate that right which the law has wisely and justly postponed, till he should chance to succeed in the order of the intail. If this method of suffering recoveries were once established as legal, the eldest sons of the first families in *England*, who are tenants in tail in remainder, expectant on the estate for life of the father, might dispose of the inheritance of their estates at the age of twenty-one, against the consent, and in spite of the authority or the freehold of their parents. Conveyances to make a tenant to the *præcipe* in a common recovery, are considered as mere instruments to make parties in a fictitious action, to serve the purpose of him who means to suffer the recovery. Such a feoffee, as in the present case, was often called a mere *actor fabulæ*. If he was tenant for years of the lands

con-

conveyed by the feoffment before the making of it, his term would not merge in the fee-simple; no dower could arise out of it; his judgments or statutes would not bind it. This being the uniform tenor of determinations in courts of law, in which the intent of the conveyance has been considered, and not the mere legal operation of it, it followed, that the validity of the estate must depend on the right and power of him who made it to suffer a recovery. If the feoffor had no such right or power, his feoffment was void; and the estate conveyed, being founded in fraud, was as no estate in judgment of law. The common law avowed these principles, and the legislature had adopted them; for the statute 14 Geo. 2. c. 20. which was made to support common recoveries against nice exceptions, and to raise presumptions in favour of them after a limited time, most anxiously provides, that the persons joining in such recoveries should have sufficient estate and power to suffer the same; as if the legislature had foreseen the present case, and were aware and afraid that tenants in tail in remainder might, by colour of that law, in future times suffer common

recoveries, without the concurrence of the true immediate owner of the freehold.

On the other side it was argued, that this recovery was valid, and that *James Earle* was actually tenant of the freehold when judgment was given. First, because when Sir *Robert Atkyns* entered, in consequence of the judgment which he obtained against Lady *Atkyns*, the jointress, he became tenant in tail in possession. Secondly, because even if he were only tenant for years, his feoffment would convey an estate of freehold. In support of the first of these positions it was argued, that a judgment is an act of law, and, whilst it continues in force, destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party, but gives a right of possession to the recoveror. If the judgment in ejectment did not produce this effect, the lessor of the plaintiff could not enter, or be intitled to the writ of *habere facias possessionem*; but his having a right to enter and sue out that writ, infers his right to the possession. Whilst the judgment stands in force, it removes an inter-

intervening estate out of the way, and during that time it is the same thing as if it had never existed, and the recoveror's right to the possession will continue until judgment is reversed by error, or falsified in another action. In consequence of these principles, it followed, that the right to the possession and the remainder in tail meeting in the same person, and that person being Sir *Robert Atkyns*, the possession and the remainder in tail united, and Sir *Robert Atkyns* became seised of an estate tail executed, or in other words of an estate tail in possession.

If the nature of an action of ejectment, and the consequence resulting from a recovery in it, were considered, it would appear in a clearer light.

An ejectment is a possessory action, in which almost all titles to land are tried; whether the party's title is to an estate in fee, tail, for life, or for years, the remedy is by one and the same action. In an action of ejectment the plaintiff recovers only the possession of the land, and the execution is of the possession only; but if the lessor of

of the plaintiff recovers only the possession of the land, it may be asked, how he becomes seised according to his title? To which it may be answered, that when a person is in possession by title, as every person is who enters in execution of a judgment in ejectment, because the law does no wrong, the possession and title unite; for it is a rule of law, that when a man, having a title to an estate, comes to the possession of it by lawful means, he shall be in possession according to his title. As where the title is to have a fee, he becomes seised in fee, where the title is to have an estate tail, he becomes seised of an estate tail, and so on; the law casting the estate upon him according to his title: and were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates, and would never answer the purpose for which it was brought into use, if the lessor of the plaintiff acquired no more than a bare possession after an execution or entry on a judgment in ejectment.

In support of the second position it was said, that a feoffment operated on the possession, without any regard to the estate or interest

interest of the feoffor. A grant operated on the estate or interest which the grantor had in the thing granted. To make a feoffment good and valid, nothing was requisite but possession; and where the feoffor had the possession, although it was but a bare and naked one, yet a freehold or fee simple passed by reason of the livery. It was no plea in avoidance of a feoffment, that the feoffor had nothing in the land at the time of the feoffment, because the land passed by the livery; if the operation of the feoffment was questioned, the only plea was, *ne enfeoffa pas*, which put in issue only the livery.

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Lit. f. 611.

698.

1 Inst. 366. b.

Year Book

10 Ed. 4, 8,

9.

Lord Chief Justice *Holt* laid it down as clear law, in the case of *Hunt v. Burne*, that if a lessee for years makes a feoffment with livery, though the lessor be on the land protesting against it, yet the land passes, because the lessee was intitled to the possession. And this opinion was supported by the determination in the case of *Read and Morpeth v. Errington*, where the question was, if a feoffment by a lessee for years, the lessor being upon the land, was a good feoffment? for it was pretended, that his being upon the land guarded it so that no feoffment could be made; but the

Cro. El. 321.

the court was of opinion, that the feoffment was good, because the lessee had the sole right to the possession, and livery ought always to be given of the possession. Before the statute of uses, a *cestui que use* conveyed the use by bargain and sale, and afterwards levied a fine to a stranger. And the question was, whether the fine was not void, as neither of the parties had any thing in the land? for by the bargain and sale the use was in the bargainee, and nothing was in the bargainor or in the stranger. It was argued, that if this fine was not good, great inconveniencies would follow, for that many recoveries had been suffered against the bargainor after he had conveyed the use; to which *Fitzherbert* replied, "It is the folly of purchasers that they do not take a feoffment from the *cestui que use* before the fine is levied; for if they do, the fine will be good. I, for my part, (says he) will never purchase any land without taking a feoffment, so that I may be in possession when the fine is levied; for then the fine will undoubtedly be good."

Year Book,
27 Hen. 8.
20.

The possession here spoken of must be a freehold at least, because nothing less than

than a freehold will support a fine; for if neither the cognizor nor cognizee had an estate of freehold in possession, remainder or reversion, at the time of levying the fine, it would be void. The feoffment here spoken of is the feoffment of a *cestui que use* after he had parted with the use, and whilst the freehold and inheritance of the estate was in the feoffees, so that it was the feoffment of a person who had only a bare and naked possession (unaccompanied with right) to a stranger. This was the opinion and this was the practice, of one of the greatest lawyers of the age. The observations upon the opinion of *Fitzherbert* are, that if a feoffment from the *cestui que use* to a stranger, after he had conveyed the use, would have made the fine undoubtedly good, the like feoffment would have made a good tenant to the *præcipe*: and for this plain reason, because the feoffment passed a freehold.

There is a case in *Dyer*, 340, where the feoffment of a person in remainder, in the absence of the tenant for life, was determined to be a good feoffment. The case was, a remainder-man in fee enfeoffed a stranger,

stranger, in the absence of the tenant for life, who neither attorned nor assented to the feoffment, but occupied the estate during his life; and it was held to be a good feoffment for the fee simple. And in the case before the court, the feoffment was made by Sir *Robert Atkyns* the remainderman, in the absence of the tenant for life, who neither attorned nor assented, and who occupied the estate during her life.

A distinction was made between rightful and wrongful conveyances. A fine, release, or bargain and sale are called rightful conveyances, and a feoffment a wrongful one; but no such distinction exists, for all conveyances are in themselves equally rightful, and are to be made use of according to the nature of the case to which they are applicable; that a freehold would not pass by a fine, release, or bargain and sale, from a person who had only a bare and naked possession, did not proceed from these conveyances being lawful ones, but from the nature of them, whose property it was to convey nothing but what the maker of them might lawfully convey, because they operated as a grant; therefore to infer from thence, that a freehold would not pass by

by a feoffment which was a conveyance of a different operation, and whose property was to pass a freehold and fee by force of the livery, was an inconclusive argument, every one who can get into possession has and ever had a power to make a feoffment, for the law makes no distinction of persons; and whenever a tenant in tail in remainder had obtained the possession, whether by right or by wrong, and had done an act whilst in possession to make a tenant to the *præcipe*, in order to suffer a common recovery, no instance could be produced where such an act had been adjudged fraudulent, unfair, or irregular.

The principal argument, opposed to the doctrine here laid down, might be reduced to the head of inconvenience. But the question was not what inconvenience would attend the determination either way, but what was the law. The inconvenience, if there were one, arose from the nature and operation of a feoffment, and could not be avoided but by taking away that conveyance, or depriving it of an operation which it had been allowed to have by all the sages of the law. But to do that, was not in the power of a court of justice, since no max-
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im of the common law could be abrogated or abolished, but by a legislative authority. It was once thought to be a great inconvenience that a descent immediately after a disseisin, should take away the entry of the person disseised ; at another time it was thought to be no small one, that the son should lose his patrimony because he happened to be borne out of time ; and, until lately an heir might have been deprived of his family estate by the warranty of an ancestor, who was never in possession of it. These inconveniences were as great as that which was pretended to arise from the feoffment of a tenant in tail in remainder, expectant on an estate for life, and yet they continued through ages, till the legislature took them away, when the law was doubtful, it might be allowable to draw an argument from inconvenience ; but where the law was clear and precise, as it was, that that the feoffment of a person in possession let him come to the possession how he would, passed a fee, an argument from inconvenience was not admissible, because it tended to undermine and overthrow the law.

Lord *Mansfield* delivered the resolution of the court, of which I shall present the reader

reader with an abstract, as far as it relates to the validity of the recovery.

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“ As Lady *Atkyns* had an estate for life
“ in the premises, and did not join by sur-
“ render or otherwise, in any conveyance
“ of the freehold to *James Earle*, the tenant
“ to the *præcipe*, the great question is,
“ whether *James Earle* had acquired the
“ freehold by disseisin?” — The better to
judge of this question, it will be proper to
attempt finding out what the old law
meant by a disseisin, which constituted the
tenant of the freehold, in respect of every
demandant suing out a *præcipe*, although
the owner’s entry was not taken away ; for
where the right of possession was acquired,
and the owner put to his real action, there,
without doubt, the possessor had got the
freehold, though by wrong. Seisin is a
technical term, to denote the completion
of that investiture by which the tenant was
admitted into the tenure, and without
which no freehold could be constituted, or
pass. *Sciendum est feudum sine investitura*
nullo modo constitui posse. Disseisin must
therefore mean, some way or other of
turning the tenant out of his tenure, and
usurping his place and feudal relation.

Feud. lib. 1.
tit. 25.

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Formerly no tenant could alien without licence from the lord; when the lord consented, the only form of conveyance was by feoffment, publickly made *coram paribus*, with the lord's concurrence. Homage or fealty was solemnly sworn, and suit of court and services were frequently done. The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers. The freehold never could be in abeyance, because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his *precipe*. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*.

The statute of *quia emptores terrarum*, and other statutes which extended the power of alienation to the king's tenants *in capite*, the frequent releases of feudal services, the statutes of uses and wills, and at last the total abolition of all military tenures, have left little more than the names of feoffment,

feoffment, seisin, tenure, and freeholder, without any precise knowledge of the things originally signified by these sounds: the idea which modern times annex to freehold or freeholder, is taken merely from the duration of the estate.

Copyholds, and the customary freeholds in the North, retain some faint traces of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that usurping such copyhold or customary tenure is a different fact from a naked possession or occupation of the land; but whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisins, upon every change of a tenant by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that formerly it was as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

Disseisin is a complicated fact, and differs from dispossessing. The freeholder by

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disseisin differs from a possessor by wrong. *Bracton* puts many cases of possession wrongfully taken, which he calls intrusion, because there was no disseisin, *possessio quæ nuda est omnino, et sine aliquo vestimento quæ dicitur intrusio*. A particular tenant, according to the feudal notions, was in as of the seisin of the fee, of which his estate was a part; if he aliened the fee, which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held, he forfeited his particular estate, for having betrayed his seisin with, which he was intrusted. But on account of the privity and confidence between him and the reversioner, and the notorious solemnity of the act of investiture, his feoffment disseised the reversioner. *Bracton* mentions the disseisin in this case, as a necessary consequence, and as a thing which could not possibly be otherwise;—*item facit quis disseisinam cum quis in seisina fuerit ut de libero tenemento et ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo, alium feoffaverit in prejudicium veri domini et fecerit alteri liberum tenementum; cum duo simul et semel de eodem tenemento et in solidum esse non possunt in seisina*. He considered it as impossible for the true tenant

tenant not to be put out, when the other actually came into his place. So late as the 32 *Eliz.* in the case of *Mathefon v. Trot*, 1 *Leon.* 209. the distinction upon which the judgment turned, was,—“ that *Henry Denny* gained a wrongful possession in fee, but did not gain any seisin, so no disseisor, therefore the descent to his heir was not privileged.”

The precise definition of what constituted a disseisin, which made the disseisor tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded ; for after the assise of novel disseisin was introduced, the legislature, by many acts of parliament, and the courts of law by liberal constructions in furtherance of justice, extended this remedy for the sake of the owner to every trespass or injury done to his real property, if by bringing his assise he thought fit to admit himself disseised. The law books treat of disseisin with a view to the assise, which was the common method of trying titles till ejectment came into use.

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Littleton, who wrote long after the remedy by assise was enlarged by statutes, and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assise.

These are the common places from whence many descriptions have been cited of a disseisin, but such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant and freeholder *de facto* in spite of the true owner.

Though the term *disseisin* happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin, or disseisin by election, is very different. This distinction of disseisin at election is made in the case of *Blundel v. Baugh*, *Cro. Car.* 302. In a manuscript report of this case, much fuller than the printed one, the three judges, with whom agreed the four judges of the Common Pleas, argued and held, “ that the lessee for years of the “ tenant at will was a disseisor at the election of the original lessor for the sake “ of

“ of his remedy, but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons.” And the manuscript note says, if a *præcipe* was brought against him, he might say, “ I am not tenant to the freehold.”

If a lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will consider himself as disseised, or not.

Metcalf *ex dem.* *Parry*, and others, which was a case reserved at *Salop* assizes, 25th *March*, 1743, for the opinion of the court of Exchequer, who gave judgment on the 24th *November*, 1743, was thus:— Tenant in tail of lands leased by his father to a second son for lives (under a power) upon his father's death received the rent from the occupier, as owner; and, as if no such lease had been made, he suffered a common recovery: it was held, that this was only a disseisin of the freehold at election, and that therefore he could not make

a good tenant to the *præcipe*, and the recovery was adjudged bad.

I will now consider whether *James Earle* can be deemed a good tenant of the freehold by disseisin. Disseisin is a fact, it is not found; all the jury say is, that soon after the judgment in ejectment, Sir *Robert Atkins* entered, and was in possession. This must be taken to be an entry in consequence of the judgment; it was so considered upon settling the special verdict, otherwise the defendants have no case; for it is not found that Lady *Atkins* was ever ousted, or quitted the possession, or that Sir *Robert* was ever seised. Taking possession under a judgment in ejectment, never could be a disseisin of the freehold. Suppose it a real proceeding, the termor of a disseisee might, by the old law, recover against the disseisor, he might recover against the feoffee of his lessor, but he could never thereby become a disseisor of the freehold; he never could be other than a termor, enjoying in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had enfeoffed, it enured to the alienee: if the

lessor was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who, in that case, had the right of possession. Suppose the proceeding (as it is) a fictitious remedy, then in truth and substance a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed, according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. It is found that the ejectment was brought by Sir Robert Atkyns to recover the possession, but it is not found that he claimed the freehold. The title must now be taken as in the special verdict, therefore it appears that he had no right to the possession. His feoffee could be in no other condition than himself; he had a possession without prejudice to the right, and could convey no other. He was not in as a particular tenant; there was no privity of any seisin, he had only a naked possession.

But

But the case is still stronger; the true owner cannot even elect to make a person in possession, under a judgment in ejectment, a disseisor. He could not bring an assize of *novel disseisin*; the entry is not *injustè et sine judicio*, but under the authority of a court of justice, and therefore lawful.

There is still behind, though it happens not to be necessary, a larger ground upon which to determine this question, and more satisfactory, because more intelligible, from the nature of a common recovery now, and a feoffment to make a tenant to the *precipe* with that view only. The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it. Nothing could be more agreeable to the law of tenures than a male fee unalienable; but this bent to set property free allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture. No sooner had the statute *de donis* repeated what the law of tenures said before, that the tenor of the grant should be observed, than the same bent permitted a tenant in
tail

tail of the freehold and inheritance to make an alienation voidable only under the name of a discontinuance; but this was a small relief. At last, the people having groaned for two hundred years under the inconveniences of so much property being unalienable, and the great men, to raise the pride of their families, and in those turbulent times, to preserve their estates from forfeiture, preventing any alteration by the legislature, the same bent threw out a fiction in *Taltarum's* case, by which tenant in tail of the freehold and inheritance, or with the consent of the freeholder, might alien absolutely. Publick utility adopted and gave a sanction to the doctrine, for the real political reason, to break intails; but the ostensible reason from the fictitious recompence hampered succeeding times how to distinguish cases which were within the false reason given, but not within the real policy of the invention, till at last the legislature applauded common recoveries by a variety of statutes. As the legislature has for ages avowed the proposition, we may now say, that common recoveries are a mere form of conveyance, all necessary circumstances of form and ceremony are
taken

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taken from its fictitious original. The policy of this species of alienation meant to take a middle way as to entails between perpetuities and absolute property; alienations were allowed, yet in such a shape as necessarily required deliberation and delay; and they were only allowed to be made by tenant in tail in possession, or by tenant in tail in remainder, with the consent of the owner of the first estate for life, the eldest son was restrained in the life-time of his father or mother, or any other ancestor or relation seised for life under a family settlement. The act of 14 Geo. 2. proceeds upon the parties to a recovery having power to suffer it: Sir *Robert Atkins*, the son, had no right to suffer a common recovery, without the concurrence of the jointress; any contrivance therefore to do it, without her joining, is artifice and evasion.

If tenant in tail in possession is disseised, though the *præcipe* be brought against the disseisor, yet, if he is vouched, the recovery shall bar, because he had power to bar. In *Jennings's* case, 10 Co. 44. the recovery is supported, because the parties had power to bar; by parity of reason this recovery ought not to be supported, because the parties had
no

no power; if it was, the law must be overturned.

Every remainder man in tail might easily get a naked possession, and make a secret feoffment.

The plan of marriage, and other family settlements, is to limit a remainder to the first and every other son in tail; the negative which the father now has upon the eldest son's suffering a common recovery, is the very means and consideration of getting the estate re-settled upon the marriage of the eldest son. By this method, the moment, he attains to the age of twenty-one years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. This consequence alone, in a case unprecedented, is a sufficient objection.

If before the introduction of common recoveries, as a conveyance, this question had been agitated in an adversary real action, upon a plea, that *Earle* was not tenant to the freehold, it would have been adjudged from the law, and artificial learning of tenures, that he could not be so considered.

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sidered. If the question had been, whether tenant in tail in remainder should, by such an injurious entry and feoffment, acquire a benefit to himself, to the prejudice of his reversioner, it would have been adjudged, from eternal principles of justice, that an act founded in wrong, should not, by virtue of the crime itself, become legal for the author's advantage; as it is now agitated, when common recoveries are established as a species of alienation, the only question is, whether the rule of law, which requires the concurrence of the owner of the first estate for life, shall be overturned? It is better to subvert the rule directly, than suffer it to be done by a secret injurious entry and feoffment, which cannot be prevented, and which the owner may never hear of.

There is no injury or wrong, for which the law does not provide a remedy. But if this stratagem should prevail, redress must follow too late, unless the entry of the tenant for life shall avoid the recovery; if it would, there is an end of the present question, for the jointress entered, and was intitled to the profits from Sir *Robert Atkyns* as a trespasser *ab initio*.

In

In every light, and upon every ground of law, this recovery is bad.

Notwithstanding these arguments, judgment was unanimously given for the defendant, on the ground that the plaintiff was barred by the statute of Limitations, the ejectment not having been brought within twenty years after the lessor's title accrued.

A writ of error was brought in the House of Lords, where it was also determined that the plaintiff was barred by the statute of Limitations.

5 Brown,
269.

John Atkyns, the plaintiff in this cause, having died without issue, the person who was next in remainder under the will of Sir *Robert Atkyns*, brought an ejectment for the recovery of the same premises: and the validity of this recovery having been again discussed in the court of King's Bench in *Mich. 18 Geo. 3.* Mr. Justice *Aston* delivered the opinion of himself, Mr. Justice *Willes*, and Mr. Justice *Asbhurst*, (Lord *Mansfield* being absent) that the recovery was void, because *James Earle* was not a good tenant

to

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to the *præcipe*, and judgment was therefore given for the plaintiff.

Cowper's
R. 689.

The arguments which were made on that occasion are very accurately reported by Mr. *Cowper*; but as they are the very same which had been used on the former hearing, it is unnecessary to state them.

*Bargain and
Sale inrolled
Hynde's
Case,
4 Rep. 71.
Forrester,
167.*

50. A good tenant to the *præcipe* may be made by bargain and sale inrolled; and the bargainee may appear and vouch before entry, or before the bargain and sale is inrolled, provided it be inrolled within six months, as prescribed by the statute: for although the freehold does not pass from the bargainor until the inrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor, at the time when the bargain and sale was executed, by relation.

51. As common recoveries are much favoured by the courts of law, a bargain and sale to make a tenant to the *præcipe*, will not be deemed void on account of any trifling mistake or inaccuracy.

Thus

Thus where *Nathaniel Lord Viscount Say and Sele* conveyed his estate to *B. K.* for the purpose of making him a tenant to the *præcipe*, by a bargain of sale, which was worded in the following manner: "Wit-
 "nesseth, that for and in consideration of
 "five shillings by the said *B. K.* to the said
 "Lord *N.* in hand paid, as also for the
 "cutting off all entails, and for the bar-
 "ring of all remainders and reversions of,
 "in, and upon all and singular the premises,
 "and for settling and assuring the same to
 "the said Lord *N.* and his heirs, doth bar-
 "gain, sell, and confirm unto the said
 "*B. K. &c.*"

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Lloyd v. Vis-
 count Say
 and Sele.

1 Salk. 341.

10 Mod. 40.

1 Brown 379.

The court of King's Bench were of opinion, that this deed passed the freehold, because such was the plain intention of it.

Upon a writ of error brought in the House of Lords it was contended, that this bargain and sale could not convey any estate, because it was not mentioned therein that any person did bargain and sell the lands in question. There appeared, indeed the words *bargain and sell*, but it was not said who bargained and sold, and conse-

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quently

quently Lord *Nathaniel* did not bargain and sell.

On the other side it was argued, that it appeared *primâ facie*, that the consideration money was paid by *B. K.* to Lord *N.* and that it was for barring all intails and remainders in the premises, and assuring the same to Lord *N.* and his heirs; that it appeared as well by this deed itself as by the evidence on the trial, that the manors and lands therein mentioned were the estate of Lord *N.* and that the intent of the deed was to make *B. K.* tenant of the freehold, in order that a common recovery might be suffered; and therefore the Court of King's Bench were unanimously of opinion, that the freehold was well conveyed by this deed. The judgment was affirmed.

Lease and Release.

52. A tenant to the *præcipe* may also be made by lease and release; and the reservation of a pepper-corn in the bargain and sale for a year, is a sufficient consideration to raise a use in the bargainee, so as to make the release valid, for the purpose of supporting a common recovery.

Thus where a tenant in tail made a lease, rendering a pepper-corn rent, and afterwards

wards a release to make a tenant to the *præcipe*.—It was determined that the word *grant* in the lease would make the lands pass by way of use; that the reservation of a pepper-corn was a good consideration to raise an use to support a common recovery; and that the lease, being within the statute of Uses, there was no need of an actual entry to make the lessee capable of taking a release.

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Barker v.
Keate.
1 Mod. 262.
2 — 249.

53. We have seen, that, in general, a common recovery cannot be valid without a tenant to the *præcipe*. Yet, in some cases, a common recovery may operate by estoppel, although there be no tenant to the *præcipe*; but this is only where the person who suffers the common recovery is tenant in fee, for the issue in tail cannot be bound by estoppel, as they do not claim from their immediate ancestors, but from the first purchasers, *secundum formam doni*.

A Recovery may, in some Cases, be good without a Tenant to the Præcipe.
10 Mod. 45.
Godb. 147.

54. Common recoveries having been long considered by the judges, and also by the legislature, as common assurances, every sort of favour has been shewn them; and as the validity of recoveries has frequently been called in question, on account of irregularities in making a tenant to the

H 2

præcipe,

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præcipe, the following statute was made to obviate that inconvenience.

14 Geo. 2. c.
20.

Sect. 5. "Whereas it has frequently hap-
 "pened, that the deeds for making the te-
 "nant to the writs of entry, or other writs
 "for common recoveries, have been lost,
 "or that the fines or deeds, making the te-
 "nants to the said writs, have not been le-
 "vied or executed till after the judgment
 "given in such recoveries, and the writ of
 "seisin awarded; by reason whereof great
 "doubts have arisen, whether such recove-
 "ries, for want of proper tenants to the
 "writs, are good and effectual in law: to
 "prevent such doubts for the future, and
 "in order to render common recoveries
 "more certain and effectual, be it enacted,
 "that every common recovery already suf-
 "fered, or hereafter to be suffered, shall,
 "after the expiration of twenty years from
 "the time of the suffering thereof, be
 "deemed good and valid to all intents and
 "purposes, if it appears upon the face of
 "such recovery that there was a tenant to
 "the writ; and if the persons joining in
 "such recovery had a sufficient estate and
 "power to suffer the same, notwithstand-
 "ing the deed or deeds for making the
 "tenant

see

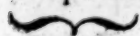
"tenant to such writ should be lost, or not
"appear. Chap. III.

Sett. 6. " And be it further enacted by the
" authority aforesaid, that from and after the
" commencement of this act, every reco-
" very already suffered, or hereafter to be
" suffered, shall be deemed good and valid
" to all intents and purposes, notwithstand-
" ing the fine, or deed or deeds, making
" the tenant to such writ, should be levied
" or executed after the time of the judg-
" ment given in such recovery, and the
" award of the writ of seisin as aforesaid,
" provided the same appear to be levied or
" executed before the end of the term,
" great session, session or assizes, in which
" such recovery was suffered; and the
" persons joining in such recovery had a
" sufficient estate and power to suffer the
" same as aforesaid."

55. In ejectment, the jury found a spe-
cial verdict that *Sarah Williams*, being te-
nant in tail of the premises in question,
conveyed the same by lease and release
dated the 19th and 20th of *November 1778*
to a person to make him tenant to the *præ-*
cipe in order that a common recovery

Goodright
ex dem. Bur-
ton v. Rigby,
H. Black.]
Rep. vol. 2.]
46.

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might be suffered, which was accordingly suffered, and a writ of seisin awarded, tested the 6th of the same month of *November*, returnable in 15 days of *St. Martin*, to which the sheriff returned, that he by virtue of the said writ, on the 10th of *November* in the same term, did cause full seisin of the premisses therein mentioned to be delivered to the demandant.

It was contended that this recovery was void, for it appeared upon the record that seisin was delivered by the sheriff ten days before the date of the conveyance to the tenant of the freehold, when in fact *Sarah Williams* was in possession of the lands; and that this case was not within the statute 14 *Geo. II. c. 20. s. 5.* which arose from the fictitious relation to the first day of the term, and was made for a different purpose, viz. to prevent recoveries being set aside where the tenant to the *præcipe* was created by deed executed after the award of the writ of seisin. The words of the 6th section of the act were, “executed “after the time of the judgment given “and the award of the writ of seisin.” But there was a material difference between the

Pigot 58.
Wilson on
Fines 348.

the *award* and the *execution* of the writ, and the 7th and 8th sections expressly provide that the act should not be extended beyond its strict limits.

The Counsel on the other side were stopped by the Court, who said, that though there might have been some doubt if it had been found a fact, that seisin was actually given on the 10th of *November*, yet the day named in the return was immaterial; for it was not necessary to name any particular day, and the return would have been good without it. All that was necessary was, that seisin should be delivered after the judgment, and before the return of the writ, and that the proceedings should all be in the same term. That those requisites were complied with in the present case, which was directly within the statute 14 *Geo. 2. c. 5.* and 6. As therefore the day mentioned in the sheriff's return was repugnant to the rest of the proceedings, it was to be rejected, and there must be judgment for the defendant.

A writ of error was brought upon this judgment in the Court of King's Bench. Lord *Kenyon* observed, that the sense of the

Durnford and
East's Rep.
vol. 5. p. 177.

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clause in the statute 14 Geo. 2. was, that the recovery should be valid, provided the deed making a tenant to the *præcipe* was executed before the end of the term in which the recovery was suffered: and it appeared upon this verdict that the deeds making the tenant to the *præcipe* were executed within the term. And though the statute, in enumerating some of the defects for which a remedy was to be applied, does not mention this particular defect, it has always been understood that the act was intended to remedy every defect of this kind, provided that, which is there made a condition, be complied with, namely, the making of the tenant to the *præcipe* before the end of the term in which the recovery is suffered; nor could the words of the statute be satisfied by any other construction.

The other Judges concurred in opinion with the Lord Chief Justice, and the judgment was affirmed.

CHAPTER IV.

Of Voucher.

56. **I**N describing the manner of suffering a common recovery, it has been said, that when the tenant to the *præcipe* appears in court to answer the demandant's writ, he, instead of defending the title to the land, calls on another person, who is supposed to have warranted the title to him at the time of the original purchase, and prays, that the said person may be called in to defend the title which he warranted, or otherwise to give lands of equal value to those which he shall lose by the defect of his warranty.

57. Where the *præcipe* is brought against the tenant in tail who vouches over the common vouchee, the recovery is said to be with single voucher. Where the *præcipe* is brought either against a prior tenant for life, or the alienee of the tenant in tail who vouches the tenant in tail, who comes upon the voucher and vouches over the common vouchee, the recovery is then said to be with double voucher.

58. In

Chap. IV.
 Rigot 15.

58. In all real actions the demandant has a right to counterplead the voucher, (that is) to shew in his replication, that the tenant ought not to be allowed such a voucher; and the vouchee might also counterplead the warranty, by shewing, that he was not obliged to warrant the lands to the tenant.

Idem.

But when a person is vouched to warranty, and enters of his own accord into the warranty, the law presumes, that he parted with his first possession with warranty; and comes in now to warrant the same possession, otherwise he would not enter into the warranty, but would counterplead it, for he might demand the lien: and even if the tenant shewed a lien, he might counterplead it. But if he enters into the warranty without demanding a lien, no person can afterwards aver, that there was no warranty; for when the vouchee, by entering into the warranty, binds himself to render in value, in case the demandant recovers, the cause of the warranty is not examinable, either by a privy or a stranger; because the law will presume, that the vouchee was compellable to enter into the warranty,

warranty, otherwise he would never run such a risque.

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59. If the vouchee is present in court, he immediately enters into the warranty, in which case the entry in the record is thus :
 " And the said *William*, in his proper person, cometh and defendeth his right ;
 " when, &c. and thereupon voucheth to
 " warranty *Roger Blagrove*, Esquire, who
 " is present here in court, in his proper
 " person, and freely warranteth to him the
 " tenements aforesaid."

*Of vouching
in Person, or
by Attorney.*

60. It frequently happens, that neither the tenant nor the person vouched can conveniently appear personally in court, in which case they make a warrant of attorney to some other person to appear in their stead. The warrant of attorney is thus :—
 " *A. B.* puts in his place *C. D.* and *E. F.*
 " his attornies, jointly and severally against
 " *I. B.* to gain or lose in a plea of land,
 " &c."

If the person who comes in as vouchee makes a warrant of attorney, it is thus :—
 " *I. K.* whom *A. B.* voucheth to warranty,
 " putteth in his place *L. M.* and *N. O.* his
 " attornies,

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“attornies, jointly and severally against
 “I. B. to gain or lose in a plea of lands,
 “&c.”

61. The warrant of attorney must be acknowledged either before a judge, who must sign it, or the justices of assize where the lands lie, or else before commissioners appointed by writ of *dedimus potestatem de attornato faciendo*, who must certify the names of the persons whom the tenant or vouchee appoints for his attornies, under their hands and seals.

By the statute 23 *Eliz. c. 3. s. 5.* it is enacted, that every person who shall take the knowledge of any warrant of attorney of any tenant or vouchee for suffering of any common recovery, shall, with the certificate of the warrant of attorney, certify also the day and year whereon the same was knowledged. And that no person who takes any such knowledge of any warrant for any recovery, shall be bound to certify such warrant, except it be within one year next after the said knowledge taken; and that no clerk or officer shall receive any writ of entry, whereupon any common recovery is hereafter to pass, unless the day
 of

of the knowledge of the warrant shall appear, in or by such certificate.

Chap. IV.

This writ of *dedimus potestatem* is not founded on the statute of *Carlisle*, which only extends to persons who acknowledge fines, but is a writ which was provided by the common law, enabling persons, who could not appear in court, to appoint attorneys in their stead. Fitz.N.B.17.

62. Where a common recovery is suffered in this manner, the warrant of attorney is the foundation of the recovery, all the subsequent proceedings being in fact mere matters of form; but still the acknowledgment of a warrant of attorney may be void, and of consequence the recovery suffered pursuant to such a warrant of attorney, on account of any legal disability in the person who acknowledges it, and such disability may be averred, in which it differs from the acknowledgment of a fine before commissioners appointed by a writ of *dedimus potestatem*, for the acknowledgment of a fine is the assent of the party to the accommodation of the suit, by which it is absolutely compleated, and the entry of the concord is the same as entering up judgment;

See post. acc. 407. in the case of Lord 32y.

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judgment; but the acknowledgment of a warrant of attorney to suffer a common recovery is nothing more than a judicial mode of appointing another person to appear in court for the tenant or vouchee, and is no part of the record; hence these two acts are attended with very different consequences.

Vide infra
Wynne v.
Wynne.

It follows from these principles, that if a tenant or vouchee, who has appointed an attorney, for the purpose of suffering a common recovery, dies before such attorney has actually appeared for him, the recovery will be void; because the death of such tenant or vouchee is a determination of the warrant of attorney, and this circumstance may be averred, it not being contrary to the record.

Vide infra
Sir N. Bacon's Case.

64. If the warrant of attorney appears to have been given after judgment, the recovery will be void; for the writ of *dedimus potestatem de attornato faciendo* recites, that the writ of entry is pending, which is not the case after judgment: and the appearance of the attorney before the warrant was made, is without authority, and therefore void.

65. By

65. By a rule of court, made in *Hil.* 14
Geo. 3. for the more effectual and certain
 proof of the due acknowledgment of war-
 rants of attorney, taken from the tenants or
 vouchees in common recoveries, by virtue
 of any writ of *dedimus potestatem*, it is or-
 dered by the court, “ that no common re-
 “ covery, wherein the tenant or tenants,
 “ vouchee or vouchees, or any of them,
 “ shall appear and defend by attorney, shall
 “ be arraigned at the bar, unless an affida-
 “ vit or affidavits, in writing, on parch-
 “ ment, shall be made and annexed to a
 “ copy of the *præcipe*, and warrant or war-
 “ rants of attorney, acknowledged by such
 “ tenant or tenants, vouchee or vouchees,
 “ by virtue of any writ or writs of *dedimus*
 “ *potestatem*, in which affidavit or affidavits,
 “ the person or persons making the same,
 “ shall swear that he or they knew the
 “ party or parties acknowledging such
 “ warrant or warrants of attorney; that the
 “ same was or were duly signed and ac-
 “ knowledged, upon the day and year, or
 “ several days and years mentioned in the
 “ caption, or several captions thereof, that
 “ the party or parties acknowledging, and
 “ also the commissioners taking the same,
 “ were all of full age and competent un-
 “ derstanding.

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“ derstanding. That the femes covert (if
 “ any) were solely and separately examined
 “ apart from their husbands, and freely and
 “ voluntarily consented to acknowledge the
 “ same. That all the said parties knew
 “ the same warrant or warrants of attorney
 “ was or were intended for suffering a com-
 “ mon recovery to pass his, her, or their
 “ estate or estates. And further, that the
 “ rasure or razures, interlineation or inter-
 “ lineations, (if any) in the body or cap-
 “ tion of such original warrant or warrants
 “ of attorney, was or were made before the
 “ said parties, or any of them signed the
 “ said warrant or warrants, and before the
 “ commissioners, signed the said caption or
 “ captions; which affidavit or affidavits
 “ (together with the said copy of the *præ-*
 “ *cipe*, and warrant or warrants of attorney
 “ whereunto the same shall be annexed)
 “ shall be filed in the office of inrollment
 “ of writs for fines and recoveries. And
 “ it is ordered, that all and every such af-
 “ fidavit or affidavits, as aforesaid, shall be
 “ made by some attorney or attornies of
 “ the courts of *Westminster-hall*, or of the
 “ sessions in *Wales*, or of the counties pa-
 “ latine of *Chester*, *Lancaster*, or *Durham*;
 “ and shall be sworn before a person duly
 , authorized

" authorized to take affidavits in this court,
 " except where the party or parties res-
 " pectively, at the time of their acknow-
 " ledging such warrant or warrants of at-
 " torney, shall be in that part of *Great*
 " *Britain* called *Scotland*, or in *Ireland*, or
 " in some other parts beyond the seas. And
 " in case the said party or parties shall be
 " in *Scotland*, then the said affidavit or
 " affidavits shall be made by one of the
 " clerks of his majesty's signet, and sworn
 " before one of the judges, or other
 " person duly authorized to take affidavits
 " or depositions, in the Court of Session, or
 " Court of Exchequer in that part of the
 " united kingdom. But if the said party
 " or parties shall be in *Ireland*, or in any
 " other parts beyond the seas, then the said
 " affidavit or affidavits shall be made by
 " one of the commissioners who hath taken
 " the acknowledgment of such warrant or
 " warrants of attorney, and shall be sworn
 " either before some person duly autho-
 " rized to take affidavits in this court, or
 " before some magistrate of the place
 " where such acknowledgment shall be
 " taken, having authority to administer an
 " oath, and in the presence of a public no-
 " tary, which notary shall also certify in
 " writing,

Chap. IV. { “ writing, under his hand and seal, as well
 “ the due administering of the said oath,
 “ as also the name, signature, and office of
 “ the magistrate administering the same.”

H. Black. R.
 vol. 1. p.
 527.

66. By a rule of the Court of Common Pleas made *Trin.* 30 *Geo.* 3. it is ordered that from and after the first day of *Mich.* term then next ensuing, in every common recovery wherein the tenant or tenants, or the vouchee or vouchees, warrant or warrants of attorney shall be taken under a *dedimus potestatem*, there shall be written on every copy of the *præcipe*, and of such warrant of attorney having such affidavit or affidavits as is or are required by the rule of this court made in *Hil.* 14 *Geo.* 3. thereto annexed the *allocatur* of the Lord Chief Justice, or some one other of the justices of this court, in the same or like manner as *allocaturs* are now written on fines taken by *dedimus potestatem*; and the copy of the *præcipe* and warrant or warrants of attorney with the *allocatur* thereon, shall be filed as directed by the said rule; and that at the time of signing such *allocatur*, the writ of entry for such common recovery shall be produced before the judge signing such *allocatur*, who may mark such

writ with his title, name, or initials thereon; and such writ shall also be produced at the time of the arraignment of such recovery.

67. If the person whom the tenant vouches is not in court, then a writ called a writ of *summoneas ad warrantizandum* issues, to compel the person called upon to appear in court, and warrant the lands.

Of the Writ of Summoneas ad Warrantizandum,
1 Leon. 86.

In adversary suits, if upon a *summoneas ad warrantizandum*, the sheriff returned the vouchee summoned, and the vouchee made default, a *capias ad valentiam* issued for the tenant; but if the sheriff returned *nihil* upon the summons, an *alias* and a *pluries* issued, and then a *sequatur sub suo periculo*. And if the vouchee still made default, judgment was given for the demandant, but no judgment was given for the tenant because it appeared that the vouchee had not assets.

Booth 43.
Ficot 148.

68. Where the vouchee appears by attorney, the warrant by which he constitutes an attorney ought to bear date after the teste of the writ of summons; but how-

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ever, the omission of this circumstance will not invalidate a recovery.

Wynne v.
Lloyd,
1 Lev. 130.
Sir T. Ray.
16.
1 Sid. 213.
1 Keb. 459.

Thus in a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the writ of *summoneas ad warrantizandum* issued, but it was answered that the vouchee might appear in person without any summons, and therefore the recovery was good, and the process void. And the court said, that a common recovery being a common assurance, they would intend another warrant of attorney made in due time.

1 Inst. 241.

69. When the vouchee has entered into the warranty, he comes in *loco tenentis*; and, in judgment of law, is tenant to the demandant. And then the demandant counts against him as he did before against the tenant, and the vouchee may plead all those pleas which the tenant might have pleaded, and also any pleas which may arise after he has entered into warranty.

Jenk. Cent.
100.

Thus if a *præcipe, quod reddat*, is brought against *A.* who vouches *B.* who enters into warranty, and afterwards the demandant releases

releases all his right to *A.* although *A.* himself cannot plead this release, because from the time when *B.* entered into the warranty *A.* is not before the court, yet *B.* may plead this release, or may plead a release to himself from the demandant.

70. The demandant may release to the vouchee, although the vouchee has nothing in the land; for when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him, on account of the privity which is between them. 3 Rep. 29.

71. If a fine be levied by a vouchee to the demandant, or by the demandant to a vouchee, it will be good, because the vouchee is supposed to have the freehold. Idem.

72. By the common law, a writ of *summoneas ad warrantizandum* had nine returns. By the statute 16 Car. 2. c. 16. s. 10. the returns were abridged to five; and now, by the statute 24 Geo. 2. c. 48. s. 8. they are reduced to four inclusive; as if the writ of entry is returnable on the morrow of *All Souls*, then the writ of *summoneas* must be returnable from the day of *St. Martin* in

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fifteen days, being the fourth and last return of *Michaelmas* term. And if there are three vouchers, the writ of summons for the second vouchee is to be returnable four returns (both inclusive) from the return of the summons of the first vouchee; and writs of summons are tested four days inclusive, from the writ of entry.

73. The court of Common Pleas will not enlarge the return of a writ of summons, so as to make a term intervene between the teste and the return.

Barnard v.
Woodcock,
2 Black. R.
1201.

Thus, where a motion was made in *Easter* term 18 *Geo.* 3. that the writ of summons in five recoveries might be tested in the *Michaelmas* term preceding, and be made returnable in that *Easter* term, instead of the usual course, authorized by the stat. 24 *Geo.* 2. c. 48. which is, that it should be tested the fourth day inclusive, from the return of the writ of entry, and be returnable the fourth return after the return of the writ of entry; in consequence of which, writs of summons must be returnable either in the same term in which they were tested, or, at farthest, in the very next term.—The occasion of this application was, that Earl

Cowper,

Cowper, the vouchee, had acknowledged the warrants of attorney to appear to the summons, before commissioners appointed by *dedimus* (which recited the summons as returnable in the preceding *Hilary* term) at *Florence*, on the 13 *December*, 1777, but they did not arrive in *England* till after the end of *Hilary* term; and as the return is usually of the same term wherein the recovery is in fact arraigned at bar, and the *teste* must precede the actual acknowledgment of the warrant of attorney by the vouchee, this proceeding could not be made regular, without suing out a writ of summons with a much longer return than the course of practice will at present allow. The like inconvenience must occur whenever the vouchee dwells in any distant country, as the *East* or *West Indies*; but that objection had been used to be cured in a very unwarrantable manner, by altering the date of the caption after it arrived in *England*, so as to suit the term in which the recovery was arraigned, till the late rule of court in *Hilary* term 14 *Geo.* 3. (which directs *inter alia* an affidavit to be made of the true time of taking the caption) put a stop to this, among other gross irregularities in the practice of suffering recoveries.

Ante f. 65.

The court conceived that they had not power to make such a rule, or at least, that they could not foresee all its consequences, it would be highly imprudent to authorize such a proceeding, by a previous direction from the bench; but intimated, that no blame should fall on the officer, who should make out the process as prayed for, but the same to be at the hazard of the parties, and without prejudice to any future question, that might arise, on the validity of such recoveries.

Gibbons v.
Stevenson,
2 Black. R.
1223.

74. A motion, similar to this one, was made in *Mich. 19 Geo. 3.* and received the same denial from the court. The facts were, that the *dedimus* was tested the 26 February, 1777, and recited a writ of summons, returnable the first day of *Easter* term, 1777; so that, properly, the summons should have been returnable, and the recovery had, in *Hilary*, 1778. which the distance rendered impossible.—Therefore, on application to the Master of the *Rolls*, he ordered the curfitor to make out a writ of entry, returnable in *Michaelmas* term, 1777; upon which the officer made out a writ of summons, returnable in the next *Hilary* term, of which term the tenant's appearance

appearance was entered. And then they imparled from *Hilary* to *Easter*, from *Easter* to *Trinity*, and from *Trinity* to *Michaelmas*, when the recovery was arraigned. And if the vouchee was then living, it was apprehended that the recovery would be valid; but, if he was dead, it would be erroneous.

CHAPTER V.

Of Judgment.

75. **I**N consequence of the default made by the person who is last vouched in a common recovery, and his departure in despite of the court, judgment is given that the demandant shall recover seisin of the lands in question, and that the tenant shall recover against the vouchee, lands of equal value to those warranted by him, and now lost by his default. And as soon as judgment is given, the recovery becomes binding on all the parties to it, and their heirs.

The entry of the judgment upon the record is thus:— “ therefore it is considered
 “ that the aforesaid *W. G.* do recover his
 “ seisin against the said *W. L.* of the tene-
 “ ments aforesaid, with the appurtenances,
 “ and that the said *W. L.* have of the
 “ lands of the aforesaid *W. G.* to the va-
 “ lue, &c.”

76. If

76. If judgment be given in a common recovery, before the return of the writ of entry, or the return of the writ of *summonas ad warrantizandum*, it is void, because the court has no power to proceed until the return of the writ of entry, and the appearance of the vouchee; for the parties are not supposed to appear until the return of that process, which issues for the sole purpose of bringing them into court.

77. In every species of action, the death of either of the contending parties puts an end to the suit; and therefore, in a common recovery, if either the demandant, the tenant, or any of the vouchees dies before judgment is given, the recovery is void.

78. Judgments, however, are not always considered as having been given on the day on which they are pronounced, but have frequently a relation to the first or some other day of the term in which they are given: and if all the parties are living on the day to which the judgment relates, the recovery will be good, for the judges take no notice of the day on which the recovery was passed in court.

*In what Cases
Judgments
have Relation
to the First or
other Day of
the Term.*

4 Rep. 71. a.
2 Black. R.
735.
1 Stra. 18.
Pigot 59.

79. The

Chap. V.

Cro. Car.

102.

1 Bulst. 32,

35.

3 Durnford

& East's

Rep. 185.

79. The term in law is considered to many purposes as but one day; and therefore if judgment be given at any time during a term, it relates to the first day of that term, and is considered in law as having been given on that day: and the first day of term is the effoin-day, for the *quarto die post* is only a day of grace.

80. However, if a writ of entry is returnable on the second, or any other return-day of the term, judgment will then relate to that return-day, and not to the first day of the term; for the courts will not consider the judgment in a recovery to have been given prior to the return of the writ of entry. And where the term, by the proceedings in it, suffers a division; as where any process issues, during the continuance of the term, then the judgment relates to the effoin-day of the return of that process, and not to the first day of the term.

81. It follows, from these positions, that when the vouchée in a common recovery, appears in person at the return of the writ of entry, then the judgment relates to the
return-

return-day of the writ of entry, and is considered in law as having been given on that day, but if the vouchee appears upon a writ of *summoneas ad warrantizandum*, then the judgment relates to the day of the return of that writ.

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Thus, where *Edward Shelley* suffered a common recovery, in which he was vouched by attorney on the 9th day of *October* (which was then the first day of *Michaelmas* term) and died before six in the morning of that day: the recovery was passed that day about ten o'clock, and it was adjudged that the death of *Edward Shelley* did not invalidate the recovery, for the writ of entry was returnable on the *octave* of *St. Michael*, and the judgment had relation to that day, which was the said 9th day of *October*, on which day the vouchee was alive, and the law makes no fractions of a day.

Shelley's
Case,
1 Rep. 93.
Moor 136.
Jenk. Cent.
249.

82. If a warrant of attorney bears date after the return-day of the writ of entry on which a recovery is suffered, the recovery will be void; because the judgment relates back to the return-day of the writ of entry.

Thus,

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Sir Nich.
Bacon's Case,
Dyer 220,
p. 13.

Thus, where the writ of entry was returnable on the *oſtave* of *St. Michael*, which was the 9th day of *October*: the writ of *dedimus poſtatem de attornato faciendo* bore date the 11th of *October*, and the *mittimus* thereof bore date the 30th of *October*: the recovery was adjudged to be erroneous, becauſe the judgment, on whatever day of the term it was given, related back to the return-day of the writ of entry, which was the firſt day of the term, ſo that the warrant of attorney was made, after the time when the judgment was ſuppoſed to be given.

83. If a vouchee in a common recovery who comes in upon a writ of *ſummoneas ad warrantizandum*, and appears by attorney, dies before the return of the writ of *ſummoneas*, the recovery is void: becauſe the judgment could not poſſibly have been given in ſuch recovery until the vouchee had appeared in court and made default: and as the vouchee could not appear until the return of that proceſs, which iſſued for the ſole purpoſe of bringing him into court, it follows that judgment muſt have been given after the death of the vouchee, which was a determination of the warrant of attorney;

torney; and these facts being collateral to the record, may be assigned for error.

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Thus, in a writ of error to reverse a common recovery it appeared by the record, that a writ of entry *sur disseisin en le poſt* was brought by Sir *Watkin Williams Wynne*, returnable *quinden. Paſch.* 13 *Geo.* 2. against *William Thomas*, who appeared in person and vouched *James Apperley* and *Alithea* his wife; whereupon a writ of *ſummoneas ad warrantizandum* was awarded, returnable in *craftino aſcenſionis Domini* (which was on the 16th of *May*) on which day the ſaid *James Apperley* and *Alithea* his wife appeared by *Joſiah Hodſen* their attorney, and entered into warranty, and vouched over the common vouchee, who made default, whereupon judgment was given, and a writ of ſeiſin awarded; and the ſheriff returned that he had delivered ſeiſin.

Wynne v.
Wynne,
1 Wils. R.
35.

The error assigned was, that *Alithea* died before judgment was given in the ſaid recovery, and for this the plaintiff in error prayed, that the recovery might be reversed. Issue was joined, that *Alithea* did not die before judgment. A ſpecial verdict was found, that *Alithea* died on the 10th day

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day of *May*, six days before the return of the writ of *summoneas ad warrantizandum*, but whether she died before judgment or not, the jurors left to the opinion of the court.

MSS. note.

This case was argued on behalf of the plaintiff in error, by Mr. *Clive*, who made two points, first, that the death of *Alithea Apperley*, vouchee and tenant in tail, as found by the special verdict, made the judgment in the common recovery erroneous.

Secondly, that upon the whole record, and the continuances as entered, the judgment appeared to be given, and the recovery passed, after the death of the vouchee; and could not be made good by relation, as a judgment or recovery in her life-time.

In support of these positions, he argued, that recoveries were erroneous, where the vouchee or other necessary party did not appear, either in person or by attorney, for, without an appearance there could be no warranty, no vouching over the common vouchee, and consequently no judgment. In this case, *Alithea*, the vouchee, did not appear

appear in person: the first consideration therefore was, whether the appearance of *Josiah Hodgson*, her attorney, was a proper appearance, or not. And with regard to that matter, taking the facts simply as they appear on the record, the vouchee neither appeared in person nor by attorney, for the death of the vouchee, before the time when the attorney actually appeared, was a determination of the warrant of attorney.

In the case of *Wynne v. Lloyd*, the error assigned was, that there was no warrant of attorney at the time of appearance, for it appeared the *teste* of the warrant of attorney was after appearance; the court in effect agreed, that an appearance, without a warrant of attorney, was error, even in the case of a person of full age, but they made the recovery good by an intendment, that the vouchee came in *gratis* before the writ of summons, and made a new warrant of attorney in due time: which shewed there must be a warrant of attorney whenever the vouchee appeared by attorney.

Ante f. 68.

If a tenant in tail within age is vouched in a common recovery, and appears by
VOL. II. K attorney,

Darcy,
Jackson,
Palmer 224.

Chap. V.
 Holland v.
 Dantzey,
 Cr. Eliz. 739.

attorney, it may be assigned for error, for such an appearance is void.

If warrants of attorney were not duly filed, it was error sufficient to reverse or arrest a judgment after verdict, before the statutes 32 *Hen. 8. c. 30.* & 18 *Eliz. c. 14.* and since these statutes it is still error, except after verdict; for the statute 4 & 5 *Anne, c. 16.* which extends these statutes of Jeofails, to judgments by default, &c. (which is the present case) has a saving, so as there be an original writ or bill, and warrants of attorney duly filed, according to the law, as is now used. If the want of form in filing them was error, want of authority in the attorney, by reason of the determination of his warrant, was much more erroneous. Therefore, if a vouchee must appear in person, or by attorney, before judgment can be given; and where the appearance is by attorney, if such attorney must have a proper warrant or authority to appear, and the want of such warrant is error, it is equally certain that the death of the vouchee before appearance, is a countermand or determination of the warrant of attorney; for a warrant of attorney to appear or confess judgment, is a naked

naked authority, not coupled with any interest, and no more than an instrument, enabling the attorney, to do an act, which the principal himself might have done in person: and as it is absurd to say that a man can acknowledge a judgment or appear in a court of justice after he is dead, so it is as unreasonable to admit, that another person should be capable of representing him, on such occasions. The personal capacity of the principal, and the derivative authority of the attorney, are founded on the same principle, namely, the life of the party, and therefore they must both end at his death.

1 Inst. 52. b.

If a man gives a warrant of attorney to confess judgment, and dies before the judgment is confessed, the death is a countermand. If a tenant or vouchee died before judgment, and judgment had afterwards been entered, it would be erroneous.

1 Vent. 310.
Salk. 87.

Thus, where a writ of error was brought to reverse a judgment in *C. B.* the error assigned was, that judgment was given against a dead person, the defendant dying after the day of *Nisi Prius*, and before the day in bank: and the court were all of opinion,

Jourden v.
Denny,
2 Bull. 241.

Chap. V.

nion, that the judgment being given against a defendant who was dead, it was erroneous, and must be reversed. That case was before the statute 17 *Car.* 2. *c.* 8. which provides a remedy where either party dies after a verdict, and before judgment, and gives a power to enter up judgment within two terms after the verdict.

The case was the same at Common Law before the stat. 17 *Car.* 2. *c.* 8. But by the stat. 8 & 9 *W.* 3. *c.* 11. *f.* 6. it is provided, that if a plaintiff or defendant dies after an interlocutory, and before a final judgment, the action shall not abate, but the plaintiff may notwithstanding proceed to a final judgment. These statutes shew what the Common Law was, and how a judgment against a dead person was to be considered.

1 Roll. Ab.
768.

If a tenant in a real action dies pending the writ, and judgment is afterwards given, it is error, because given against a dead person. Thus the Common Law stands with regard to plaintiffs or defendants dying before judgment, in real and personal actions; and there is no act of parliament which

which alters the Common Law in this case.

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The present action is a real action, it is a writ of entry upon a disseisin, and *Alithea Apperley* the vouchee, after appearance, and entering into the warranty (admitting that to be the case) was the tenant in law, and her death before judgment, was the same as if any other tenant had died, in case an action had been only between demandant and tenant, without any vouchee.

Every vouchee may take advantage of any error between the other parties: the second vouchee may assign error between the tenant and the first vouchee. The reason is, because the judgments are several and distinct, for in every common recovery there are several judgments, and several recoveries are included, and it ought to appear, that all of them are regular and against proper parties, and that all the parties are before the court.

Littleton says, if in a *præcipe quod reddat* S. 491. the tenant vouches, and the vouchee enters into a warranty; if afterwards the demandant releases to the vouchee, it is

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good:

good: for the vouchee, after he hath entered into the warranty, is tenant in law to the demandant. So in 1 *Inst.* 265. b. it is said, that when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him in respect of the privity between them.

These authorities shew, that the same regularity, even in process, is required to bring in the vouchee upon a voucher, as is requisite to bring in the tenant at first; and that the vouchee, after he hath agreed and entered into the warranty, is considered in this action as actual tenant of the freehold: and it has been shewn, that if the tenant dies before judgment, it is error, and the law is the same if the vouchee dies before judgment. It follows, that as the verdict finds the vouchee died upon the 10th of *May*, which by the record appears to be prior in time to any appearance of the vouchee (for that was not until the 16th of *May*) and no judgment was or could be given till after appearance, that therefore it is an erroneous judgment, being given after the death of the vouchee.

Pigot 196.

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With respect to the second point, two objections were made by the counsel for the defendant, first, that the assignment of error, and finding the special verdict, was against the record; and, secondly, that the judgment had relation back to the first day of the term, on which day the vouchee was alive.

The argument respecting the first of these objections, will be stated in the last chapter of this work.

As to the second objection, it was true, that the term to many purposes was considered as but one day, and that a judgment given the last day of the term, related back to the first day: but this rule was only applicable to cases between plaintiffs and defendants, where there was no continuance entered from one day to another in the same term; no fraction of the term by any thing appearing on the record, nor no injury to any third person; as it is one entire transaction on the record of that term, it is all considered as done on the first day of the term. But this judgment differs materially from the ordinary course of judgments, to which the rule of

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relation is generally applied: the record shews, that the term cannot on this occasion be considered as one day, for the continuance from one day to another, shews, that different facts were done on different days, in the same term. On these days of continuance the parties might have shewn any matter to the court: they might have shewn on the morrow of the Ascension, that *Alithea* was dead, that she died on the 10th of *May*, and then the recovery would not have passed.

These continuances therefore take away all presumption and possibility, that the judgment was given on the first day of the term, for such a presumption would be directly contrary to the record; and it would be an extraordinary doctrine to say, that no averment shall be admitted against a record, and yet that the court should be at liberty to presume a matter against a record, *viz.* when the record says a *placitum* was pending on the 16th day of *May*, that the court should presume the judgment was given long before that period. The relation or fiction of law in the ordinary course of judgments, is not against the record; and that is the reason why the court should

should not consider this judgment as given the first day of term, *stabitur præsumptio donec probetur in contrarium*; and here is the highest evidence to the contrary, the record itself. In *Shelley's* case the recovery was held to be good, because he was alive on the day on which judgment was given, though he died before the court sat, because the court would not allow a fraction of a day: but if he had died the day after judgment was given, it would have been void; for although the court would not allow a fraction of a day, yet it would allow a fraction of a term. All the court did in *Shelley's* case was extending the relation to the first instant of the day, in support of a judgment given on that day.

A judgment shall have relation to the first day of the term, as if it was given on that very day, unless there is a memorandum to the contrary on the record, as where there is a continuance of the cause until another day in the same term, and the present cause was continued until another day in the same term. In all cases of judgments by default, they do not relate back to the effoin day, which is the first day of term, but to the *quarto die post*; for the

Bulf. 35.

the court takes notice judicially, that the party was not demandable before that day, and consequently could not till then be guilty of a default, he might have appeared the first day of term, if he pleased, and then the judgment would have been given on the first day of term. So here the vouchee might have come in *gratis* before the morrow of the Ascension, but she did not, there was no appearance until that time, and as the judgment could not have been given until that day, it cannot relate back to a prior day, so as to prejudice a third person. These reasons and cases shew that judgments do not universally, and in all cases relate to the first day of term, and particularly that the judgment in the present case cannot have such a relation, because the record shews it is impossible that it should.

This case was several times solemnly argued at the bar of the King's Bench, and Lord Chief Justice *Lee* for himself and the other judges gave judgment. And in summing up the arguments, he reduced them to these three principal points.

1st. That it was insisted on for the defendant in error, that a recovery was a common

mon assurance, and as the vouchee had done all he could (if he had lived) to perfect it the court would give it an equitable construction, and not suffer it to be reversed for so small a fault, if it should be deemed one.

2dly. That the recovery should be deemed perfect from the first day of the term wherein it was passed, and then the vouchee was alive. And though the judgment was actually given after his death, yet that should have relation to the first day of term, as in the case of many other judgments.

3dly. That as the vouchee appeared by attorney at the return of the summons, and that appearance was entered on record, this was an error in fact against the record, which could not be allowed.

To these three objections to the writ of error, the court gave these answers, that as to the first, the recovery being a common assurance ought, and should be supported as far as the law would allow of; but that they could give it no equitable constructions, which create absurdities, as it would

would apparently be, if they should suffer judgment to be entered against a dead person.

To the second, that it was very true in many cases, where judgments were entered in the vacation, they should have relation to the first day of the preceding term, but that was never the case where continuances were entered on record: for, whenever there are continuances entered from time to time (as in the case of a recovery) and judgment is afterwards given, that judgment can have relation no farther backwards than to the time of the last continuance or rest; and here the time of the last continuance or rest, was the return of the writ of summons; for then the demandant imparles, and judgment was not, nor could not be given till he came again.

To the third, that the death of the vouchee was a collateral matter, not contrary to the record, and therefore the plaintiff was not estopped from assigning it for error. — The recovery was therefore reversed.

84. In another case, where a writ of error was brought from the court of Common Pleas, to reverse a common recovery, and the error assigned was, the death of the vouchee before judgment. The defendants pleaded *in nullo est erratum*, which confesses the error assigned to be true.

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Sheepshanks
v. Lucas,
1 Burr. 410.

Lord *Mansfield* said it was plain that judgment could not be given against a man after he was dead. That there could have been no judgment against the tenant to the *præcipe* in a common recovery, without a judgment over in value against the vouchee; they were all entered at the same time, and were part of the same proceeding.

The recovery was unanimously reversed, and it was said that the case of *Wynne* and *Wynne*, was an authority in point.

85. If a writ of *summoneas ad warrantizandum* be returnable on a *Sunday*, and the vouchee dies on that day, the recovery is void, because *Sunday* being a *dies non juridicus*, judgment could not possibly have been given until the *Monday* following,

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consequently the judgment must have been given after the death of vouchee.

Swann v.
Broome,
3 Burr. 1595.
1 Black. Rep.
496, 526.

Thus, where a writ of error was brought in the court of King's Bench from the Court of Common Pleas, to reverse a common recovery, and the error assigned by consent, was, "that the day of the return
" of the writ of summons was on *Sunday*
" the 13th of *May*, 1750, on which said
" 13th of *May*, *Edward Swann* the vouchee
" in the common recovery, died."

Two questions arose on this case.

1st. Whether the judgment could relate to the effoin day of the term, or to any day prior to the 13th of *May*, the effoin day of the return.

2dly. Whether, by law, a valid judgment could possibly be given on the day of the return, being *Sunday*?

Lord *Mansfield* delivered the resolution of the court, that the recovery was bad, because no judgment could, in this case, be supposed to be given before the death of the vouchee.—That this judgment could

not

not relate to the first day of the term, because it could not be given before the return of the writ of summons, which appears, by the record, to be in the term.— That it could relate only to the effoin day of the writ of summons, which was upon *Sunday*; and as the courts do not sit on a *Sunday*, judgment could not possibly have been given until the *Monday*, when the youchee was dead.

To reverse this judgment, a writ of error was brought in the House of Lords, and on behalf of the plaintiff it was insisted, that *Edward Swan* the younger, being alive on the day he was called to appear, and having appeared by his attorney, on the return day of the writ of summons to warranty, to which day the judgment in the Common Pleas must necessarily relate; must be alive when the judgment was given against him, and therefore the recovery was good. That this position follows from the reasons and authorities of legal relations of judgments, viz. that the term being considered in law as one day, judgments in general relate to, or in law are supposed to be given, and receive a construction, as if they had been given on the first day of the

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term,

6 Brown,
132.

term, and that is the effoin day. But in particular cases, where the term, by the proceedings in it, suffers a division, as in the present case by the summons to warranty, the judgment relates to the effoin day of that return; on which day it was admitted by the record, that *Edward Swann* the younger, was alive.

It is however objected, 1. That the effoin day was *Sunday*, on which day the court never sits, and so cannot be supposed to have given judgment on that day. 2. That the court never did sit on a *Sunday*, nor could it sit on that day, because forbid by several canons which were adopted by the Common Law.

To the first objection it was answered, that courts formerly commenced all law business on the effoin days, which were *Sundays* or festivals, and so might pronounce judgment on those days. The authorities in the books are many and uniform, that the judgments given in term-time, all bear relation to that day, whether a festival or not; and the reason is the same where the process is returnable in the middle of the term, before the relation to the effoin-day

day of that return. That the entry in the present case, which says, *at which day comes here as well the said Thomas in his proper person, as the said George by John Glasse his attorney; and the said Edward being summoned, &c. likewise comes, &c. and afterwards departs in contempt of the court,* was also an estoppel to say, that the judgment was not given on that day, or that it was given on any day before, or even after that day.

As to the other objection, it was said, that the very canons prohibiting, were evidence of the fact of sitting on a *Sunday*; and it was further proved by the returns of the writs, all which were formerly on festivals; and in the year 1763, nine returns out of seventeen were on a *Sunday*, as appears by the almanack of that year. That it would be strange for the king, by his writ, to order the parties to appear on a day on which no court was or could be held, if they were not to sit on that day. Besides, the many cases of testing and returns of writs, adjourning terms, casting or warranting effoins, &c. all which were equally objects of the Canon Law, prove the fact of courts actually sitting on *Sundays*.

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As to the canons, they could only have the same force as in other cases, when adopted, *viz.* to subject to spiritual censures, but not to invalidate the act; like to the canons against holding fairs on a *Sunday*, which was also prohibited by statute, under temporal penalties; but the contract was binding, till at last by another statute the contract was made invalid. But as no act extended in words to the present subject, therefore, it was not against the Common Law for the court to sit and pronounce judgment on that day; or by construction or intendment of law, the judgment as given in this case, as the entry imported, the court must intend that it was given on that day. If the Canon Law had been adopted, *i. e.* incorporated into our law, and if in after times, the legislature had thought it necessary to forbid judgments having relation to the *essoins* days, they would then have changed the returns of the writs; for it is now necessary to take out the writs returnable on the general return-days, and the greatest part of these are *Sundays*; and as they must be considered as common days of return, and as the judgments necessarily relate to these days and no other, if *Sundays* are to be for this purpose

pose taken as *dies non juridici*, then most of the judgments given in term must necessarily be bad, as bearing relation to that illegal day; and thus the return-days would remain as so many snares for error. But it may be presumed, the legislature did not thus consider it; and thought the returns and relations of law might still remain, though they knew that the courts in decency only sat on *Mondays*, and that the legal relation to *Sunday* of the judgment given on *Monday*, could be no violation of the *Sabbath*, and would still preserve private rights. For the profanation of the *Sabbath* was the only object of the legislature; but it never intended to interfere with private rights.

On the other side it was said, that a common recovery, though now become a usual mode of conveyance, must necessarily be attended with all the ceremonies and solemnities of an actual suit at law; and if those are wanting, the conveyance by recovery is as defective, as a will devising lands, to which there are only two subscribing witnesses. That as the recovery pursues the forms of a real action, it is of absolute necessity that the vouchee against

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whom

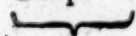
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whom the judgment is obtained, should be living on the day when such judgment is given by the court, for otherwise such judgment is erroneous. That though in all cases, the judgment shall relate as far back, as can be permitted by the facts appearing on the record, yet no fictitious relation shall presume what is in itself impossible. In the present case the writ of summons being returnable on *Sunday* the 13th of *May*, the judgment in the recovery was not, nor could be given till *Monday* the 14th of *May*; for though many nominal return days of writs were very antiently fixed upon *Sundays*, yet both by law and practice, courts of justice cannot now sit upon a *Sunday*, but the business appointed for that day is, and always must be dispatched upon the *Monday* immediately following. As therefore the vouchee died upon *Sunday* the 13th, the day preceding the judgment, the judgment was given against a person not *in esse*, and consequently was totally erroneous. That it was not sufficient to say the vouchee had done every act necessary to be done by him, that he had executed the deed to make a tenant to the *præcipe*, had acknowledged the warrant of attorney, and had thereby compleated in substance every thing requisite to this particular mode of conveyance;
for

for no warrant would empower an attorney to appear in the name of another, after the death of his principal. The vouchee, it was acknowledged, intended to perfect this conveyance, but died before he could accomplish it; and whether he died a day or a month too early, was quite immaterial. Every act done by him, might have been done in the month of *September*, previous to a recovery intended to be suffered in *Michaelmas* term; and yet it would not be contended, that if such a vouchee had died in *October*, the recovery could have been perfected in the subsequent term. It was therefore hoped, that the judgment of the court of King's Bench, reversing the judgment in the recovery, would be affirmed.

After hearing counsel on this writ of error, the judges were directed to deliver their opinions upon the following question, viz. "whether the recovery is good, or erroneous, the return day of the writ of summons being on *Sunday* the 13th of *May*, "on which day *Edward Swann* the younger died?" And the Lord Chief Baron of the court of Exchequer having conferred with the rest of the judges present, acquainted

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quainted the house, " that they all agreed
" in their opinion, that the recovery was
" erroneous." Whereupon it was ordered
and adjudged, that the judgment of the
court of King's Bench should be affirmed.

CHAPTER VI.

Of Execution.

86. **A**FTER the demandant has obtained judgement in a common recovery against the tenant, and the tenant against the vouchee, &c. the court awards a writ of *habere facias seisinam*, in the same manner as upon a judgment in an adversary action, to the sheriff of the county in which the lands lie, directing him to put the recoveror in possession of the lands which he has recovered; and when this writ is returned, the recovery is complete and executed. 1 Inst. 361. b.

87. The writ of seisin should bear teste the fourth day inclusive after the return of the writ of entry, or last writ of summons, when the vouchee comes in by summons; and there should be fifteen days between the teste and the return of the writ of seisin. Wilson 319.

88. A judgment in a common recovery, which is not regularly executed by the return of the writ of seisin, has no manner of Sir W. Jones 10.
1 Willf.R. 55.
2 Stra. 1185.

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operation; nor does it alter the nature of the estate. And as almost all recoveries are now suffered to uses, no seisin is in the recoverors, and of consequence no use is raised until the execution of the recovery; for until then the land does not pass,

1 Roll. Ab.
886.

1 Rep. 97. b.

89. If a recovery be suffered of a rent, common, &c. it is sufficient that the sheriff deliver seisin upon the land, of the rent, common, &c. by parol, for the demandant will thereby acquire the actual possession.

1 Rep. 94. b.
Id.—106. b.

90. If a common recovery be suffered of lands which are let on leases for years, the recoverors have not the reversion presently by the judgment, but it must be executed by writ, entry, or claim.

91. If a person suffers a common recovery, and dies before it is executed, the recoveror may sue execution against his heirs.

Ante f. 81.
1 Rep. 93.

Thus in *Shelley's* case it was unanimously resolved, that although *Edward Shelley* died on the very day on which the recovery passed, and consequently before the

the writ of *habere facias seisinam* could be awarded, yet that execution might be sued against his heirs.

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92. By the statute 7 *Hen. 8. c. 4.* all recoverors in common recoveries are allowed the same remedies against lessees for lives and years, by distress, avowry, and action of debt, for rents and services which become due after the recovery, as the persons against whom the recovery was had were intitled to.

1 Inst. 104.
b.

93. The awarding of a writ of seisin, its execution and return by the sheriff must appear upon record; and if a writ of execution be not found in a special verdict, it cannot be presumed by the court.

Thus in ejectment the jury found a special verdict, that *Henry* the 7th granted the manor of *Wither Slack* to *Thomas* Earl of *Derby*, to hold to him and the heirs male of his body; that *Thomas* Earl of *Derby*, grandson to the said *Thomas*, suffered a recovery of the said manor, and afterwards entered into the said manor, and was seised thereof; but no writ of execution or entry of the recoverors appeared upon

Witham v. Lewis,
1 Will. Rep. 48.
4 Brown 504.

upon the special verdict in which this recovery was found; and the court of King's Bench was of opinion, that as execution was not found, it could not be presumed, and therefore that the recovery was not good.

A writ of error was brought in the House of Lords; and it was argued, that this judgment was erroneous, and that a writ of execution, though not expressly found, ought to have been presumed, for the following reasons: First, from the exemplification of the recovery itself, as found; its antiquity of above 230 years; its being entered upon the rolls; the dignity and quality of the parties to it; and a fresh entry of *Earl Thomas*, expressly found to have been made after such recovery. Secondly, from the impossibility of any other proof of actual execution, as it was well known, that amongst the rolls of the recoveries of that and the preceding reigns, the award of the writ of execution is not entered or indorsed upon one in twenty of them, as has been usual of late years; and upon search in the proper offices where the writs of execution of recoveries suffered in those early times ought to be filed,
not

not one of such ancient writs is to be met with. Thirdly, because, had any objection been made at the time of the trial of the recovery, on this account, the court would, and ought to have directed the jury to find the execution of it, from the exemplification itself, and the possession of the defendant and his ancestors, agreeable to it.—And if so, it is difficult to give a reason why the courts of law should not draw the same legal conclusions, and make the like legal implication from facts themselves, which they would direct a jury upon their oaths to do. Fourthly, from the fatal consequences which might attend this judgment; for if this doctrine should be established, that the judges ought not to presume execution at this distance of time, it might shake the titles of great part of the property of this kingdom, which probably may depend on the validity of ancient recoveries, suffered before the stat. 34 Hen. 8. for if a jury should think proper to insist upon evidence to support such ancient recoveries, which, for the reasons above, appears impossible to be laid before them, as no attain or other remedy against them would lie in such case, all property might be subjected to an arbitrary and perhaps

perhaps corrupt determination of a jury, without any redress whatever.

On the other side it was contended, that the judgment of the King's Bench should be affirmed, because it did not appear that any writ of seisin was ever awarded upon the common recovery suffered by Earl *Thomas*, or that the same was ever carried into execution by writ of seisin, or otherwise; for, until a writ of seisin is awarded, executed and returned, (all which must appear upon record, and cannot be presumed) it is not a perfect recovery, and operates nothing; and no new estate is gained to the recoveror, nor any use raised thereby, nor is the former estate altered or changed. And it was so determined upon a question on this very recovery, so long ago as in the reign of king *James I.*— And, as in the present case, no new estate was gained to the recoveror, no new use raised, nor the old estate changed or altered by this recovery, earl *Thomas* still continued tenant in tail.

Sir W. Jones
10.

After hearing counsel in this cause, the following questions were proposed by the house to the judges:

First,

First, Whether sufficient matter was found in the special verdict, whereupon the common recovery of 5 Hen. 8. can be adjudged or taken to be a complete valid recovery?—And, secondly, if not, whether, by law, a *venire facias de novo* ought to be awarded in this case?

The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges, that there was not sufficient matter found in the said special verdict, and that a *venire facias de novo* ought to be awarded. Whereupon the judgment of the King's Bench was affirmed. (a)

94. By the statute 23 Eliz. c. 3. s. 1. it is enacted, that every original writ of entry in the *post*, or other writ, whereupon any common recovery shall be suffered, the writs of *summoneas ad warrantizandum*,

All the proceedings in recoveries may be inrolled.

(a) In a modern case Lord Kenyon says of this determination:—" Lord Derby's case has always been considered as a strange case; and the judges of succeeding times have been astonished that no application was made to the court of common pleas to rectify the defect in that recovery, according to the usual practice of the court." 5 Term Rep. K. B. 179.

the

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the returns of the said originals and writs of *summoneas ad warrantizandum*, and every warrant of attorney, as well of every demandant and tenant, as vouchee, extant and in being, may, upon the request or election of any person, be inrolled in rolls of parchment; and that the inrollments of the same, or of any part thereof, shall be of as good force and validity in law, to all intents and purposes, for so much of any of them so inrolled, as the same being extant and remaining, were or ought by law to be.

95. And by the second section of this statute it is further enacted, that no common recovery shall be reversed or reversible for false or incongruous Latin, rasure, interlining, mis-entering of any warrant of attorney, misreturning, or not returning of the sheriff, or other want of form in words, and not in matter or substance.

96. There are many exemplifications of recoveries suffered between the commencement of the reign of Queen *Anne*, and that of *Geo. 2.* whereof no entries upon the rolls in the Treasury of the Common-Pleas, nor any writ of entry, summons, or seisin, can be found.

Mr. Pigot

Mr. *Pigot* having, in the course of his practice, discovered repeated instances of this neglect, procured the following statute to be passed, in order to prevent the inconveniencies which might arise to purchasers from an omission of this kind.

14 *Geo. 2. c. 20. s. 4.* “Whereas by the
 “default or neglect of persons employed
 “in suffering common recoveries, it has
 “happened, and may happen, that such
 “recoveries are not entered on record,
 “whereby purchasers for a valuable confi-
 “deration may be defeated of their just
 “rights: for remedy thereof, be it further
 “enacted by the authority aforesaid, that
 “where any person or persons hath, or
 “have purchased, or shall purchase, for a
 “valuable consideration, any estate or
 “estates, in lands, tenements, or heredita-
 “ments, whereof a recovery or recoveries
 “is, are, or were necessary to be suffered,
 “in order to complete the title, such per-
 “son and persons, and all claiming under
 “him, her, or them, having been in pos-
 “session of the purchased estate, or estates,
 “from the time of such purchase, shall and
 “may, after the end of twenty years from
 “the time of such purchase, produce in
 “in evidence the deed or deeds, making a
 “tenant

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“ tenant to the writ or writs of entry, or
“ other writs for suffering a common reco-
“ very or common recoveries, and declar-
“ ing the uses of a recovery or recoveries,
“ and the deed or deeds so produced (the
“ execution thereof being duly proved)
“ shall, in all courts of law and equity, be
“ deemed and taken as a good and suffici-
“ ent evidence for such purchaser and pur-
“ chasers, and those claiming under him
“ her or them, that such recovery or reco-
“ veries was or were duly suffered and per-
“ fected, according to the purport of such
“ deed or deeds, in case no record can be
“ found of such recovery or recoveries, or
“ the same shall appear not to be regularly
“ entered on record : Provided always, that
“ the person or persons making such deed
“ or deeds as aforesaid, and declaring the
“ uses of a common recovery, or recove-
“ ries, had a sufficient estate and power to
“ make a tenant to such writ or writs as
“ aforesaid, and to suffer such common re-
“ covery or recoveries.”

CHAPTER VII.

In what Courts, and of what Things,
a Common Recovery may be suffered.

97. **A** Common recovery can in general only be suffered in the court of Common Pleas at *Westminster*, because a real action cannot be commenced in any other court.

Court of Common Pleas.

98. By the statute 34 & 35 Hen. 8. c. ^{26.} ~~26.~~
f. 40. it is enacted, that common recoveries may be suffered at the courts of great sessions in *Wales*, in like manner and form as in the court of Common Pleas in *England*.

Courts of Great Sessions in Wales.

See also 1 R. Eliz. ch. 8. 3. & 4.

99. Common recoveries have been suffered at all times of lands lying in the county of the city of *Chester*, in the Portmoot court of the said city.

City of Chester.

For county of Chester, see 18. Eliz. ch. 8. 3. & 4.

And by the statute 43 Eliz. c. 15. f. 4. this privilege is recognized.

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Courts of the
Counties Pa-
latine of Lan-
caster and
Durham.

Court of Hus-
tings in Lon-
don.

Bohun's Priv.
Lond. 241.
2 Rep. 57. b.

Antient De-
mesne and
Copyhold
Courts.

Pigot 103.

100. Common recoveries may also be suffered of lands lying in the counties palatine of *Lancaster* and *Durham*, in the respective courts of those counties.

The 9. Inst. 205. where it is stated, that fines & recoveries of lands in the counties of Lancaster cannot

101. By the custom of *London*, common recoveries may be suffered upon writs of right, of lands lying within the precincts of the city of *London*, in the court of *Hustings*.

102. As tenants in antient demesne and copyholders, cannot sue or be sued for the lands which they hold by those tenures in the courts at *Westminster*, they have always had the privilege of commencing actions in their own manor courts, and therefore may suffer common recoveries in those courts, if warranted by their own customs.

103. The usual mode of suffering a common recovery in a copyhold court is thus; the tenant in tail of the copyhold estate surrenders it to some other person to make him tenant to the *præcipe*: and then a plaint in the nature of a writ of entry in the post is brought against him, who vouches the tenant in tail, and he the common vouchee.

104. If

the plain recoveries at Westminster. The plain recoveries at Westminster. The plain recoveries at Westminster. The plain recoveries at Westminster.

104. If lands are customary freeholds and pass by surrender in a borough court, it is said that a recovery of such lands in the court of Common Pleas may be good.

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Oliver v.
Taylor,
1 Atk. 474.

105. A common recovery may be suffered of all things whereof a writ of covenant may be brought for the purpose of levying a fine, as of an honor, barony, castle, messuage, curtilage, land, meadow, pasture, underwood, warren, furze, heath, moor, &c. And in general a common recovery may be suffered of any thing whereof a writ of entry *sur disseisin*, or any other writ of entry will lie.

*Of what
Things a Re-
covery may be
suffered.*

106. A common recovery may be suffered of an undivided part, as well as of the whole. And where a person seised of a third part of a manor suffered a recovery of a moiety of the manor, it was held good for a third part.

Cro. Car.
110.

107. In consequence of the statute 32 Hen. 8. c. 7. s. 7. a common recovery may now be suffered of every kind of ecclesiastical or spiritual profits, as of tythes, oblations, portions, pensions, &c.

Tithes &c.
Vide Fines,
l. 207.

18 Vin. Ab.
217.

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Ante f. 16.

2 Mod. 49.

108. It was determined in *Dormer's* case, that a common recovery might be suffered of an advowson in gross, upon a writ of entry. Mr. *Pigott* says, that this must be understood of an advowson appendant to a manor, but could not be of an advowson in gross, since the parson has the freehold, and that therefore it ought not to be by writ of entry *en le post*, but by writ of right of advowson.

109. A common recovery may, however, be suffered of an advowson in gross, and a small quantity of land on a writ of entry *sur disseisin*.

Bayley v.
The University of Ox-
ford.

2 Will. 116.

Thus, where the validity of a common recovery, which had been suffered of an advowson in gross, and one acre of land, upon a writ of entry *sur disseisin*, was questioned as to the advowson: upon searching for precedents, sixteen were found, where recoveries of advowsons in gross, and a little land, had been suffered upon writs of entry *sur disseisin*; and no case was found where such a recovery was ever held bad. The court refused to hear any argument against the recovery, but said, that if this was *res integra*, perhaps it might not be right, yet
quod

quod fieri non debuit factum valet; and gave judgment that the recovery was good.

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110. A common recovery may be suffered of a rent-charge issuing out of lands; but not of an annuity which is only charged on personal estate.

Pigot 97.
Vide Turne
v. Turner,
Brown's Rep.
316.

111. It is said in *Pigot and Viner*, that a common recovery cannot be suffered of a fishery, common of pasture, estovers, services to be done, nor of a quarry, a mine, or market, for they are not in demesne, but profit only.

Pigot 96.
18 Vin. Ab.
218.

112. With respect to the descriptions which are necessary to be used of those things whereof a recovery is suffered, they should be the same as in a *præcipe quod reddat* in an adversary suit, but as recoveries have long been considered as common assurances and conveyances by consent, great indulgence has been given them by the judges.

By what Descriptions.

Thus, where a person was seised of a reputed manor only, and suffered a common recovery of it by the description of the manor of *A.* it was held good, and in this case

Thinne v.
Thinne
1 Lev. 27.

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it was said that where there was an indenture to suffer a recovery of a manor and all lands, reputed parcel thereof; and a recovery was suffered of the manor, the lands reputed parcel would pass, because it appeared by the verdict that it was the intent of the parties that they should pass: and because the constant practice and received opinion since Sir *Moyle Finch's* case had been that lands reputed parcel should pass.

Baker v.
Johnson,
Hut. 106.

113. A person being seised in tail, among other lands of two marshes, called *Knightswick* and *Southwick*, lying in an island called *Camby*, in the parish of *Northfleet*, suffered a recovery, in which *South Benfleet*, and many other parishes were named, and also *Camby*, but the parish of *North Benfleet* was omitted. And the question was, whether the lands in *North Benfleet* passed or not. The court agreed, that the town and parish being omitted, though *Camby* was a *lieu connu*, yet being in a town, the recovery did not extend to it. That a recovery in a town, parish, or hamlet, is good, and perhaps in a place known out of a town, parish or hamlet, but to admit a recovery of lands in a place known in a town, would be absurd, for there is no town in which there are not twenty places known.

114. This

114. This case was denied to be law by Lord Chief Justice *North*, who said that it had been long disputed whether a fine of lands in *lieu connu* was good, but that in the time of king *James I.* the law was settled in that point that it was good, and for the same reason a recovery would be good, for they were both amicable suits, and common assurances, and as they grew more in practice, the judges have extended them farther.

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2 Mod. 49.

Sir *Samuel Jones* being tenant in tail of lands in *Shrewsbury* and *Cotton*, which were within the liberties of *Shrewsbury*, suffered a common recovery of all his lands lying within the liberties of *Shrewsbury*; and the question was, whether the lands in *Cotton*, which was a distinct vill, though within the liberties should pass. It was adjudged, that as the jury had found *Cotton* to be a vill within the liberties of *Shrewsbury*, the lands in *Cotton* should pass by the recovery.

Lever v. Hosier,
2 Mod. 47.
S. C. by the name of *Jones v. Wait*.
1 Mod. 206.

115. In ejectment a special verdict was found, that there was a parish of *Rippon*, and a vill of *Rippon*, but the latter was not co-extensive with the former: that a person who was tenant in tail of lands in the

Addison v. Otway,
1 Mod. 250.
2 Vent. 31.
Freem. 241.

M 4

parish,

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parish, but out of the vill, bargained and sold all his lands lying in the parish of *Rippon*, with a covenant to levy a fine and suffer a recovery to the uses of the deed: that a common recovery was accordingly suffered of one hundred acres of land lying in *Rippon*: that the tenant in tail had no lands in the vill of *Rippon*, and that the intention of the parties was, that all the lands in the parish of *Rippon* should pass. It was argued, that the Common Law knows no such division of the kingdom as parishes, but only the division of vills, and therefore where a place is named in a record, and no more said, it is always intended a vill; consequently, that the recovery, if it passed any lands at all, could only pass those in the vill. But the Court were of opinion, that the recovery should extend to the lands in the parish of *Rippon*, 1st. Because otherwise the recovery would be void, it being found that the tenant in tail had no lands in the vill of *Rippon*. 2dly. Because it plainly appeared to be the intention of the parties that this should be intended the parish of *Rippon* (not because the jury had found it, for the Judges said, they would pay no attention to that), but because it appeared by the bargain and sale to

to be the intention of the parties, that the recovery should extend to all the lands in the parish of *Rippon*, and not be confined to the lands in the vill of *Rippon*; for the bargain and sale and recovery, were to be considered as one assurance. And although a place spoken of simply is in law intended a vill, and *stabitur presumptio donec probetur in contrarium*, yet here was sufficient proof of the intention of the parties.

116. In a writ of error from a judgment on *scire facias* in the Court of King's Bench in *Ireland*, brought to reverse four common recoveries in the court of Common Pleas there, two of lands in the county of *Limerick*, and two of lands in the city of *Limerick*.

Massey v.
Rice,
Cowper 346.
Mich 16
Geo. 3.

Mr. *Buller* for the plaintiff in error objected, that the several descriptions in all the four recoveries were bad. There were fourteen parcels in each recovery, and the principal objections to them were, 1st. As to the premisses in the county, because some were demanded, thus "all those the
"castle, town, and lands of, &c. con-
"taining by estimation so many acres,"
without setting out the quality of the lands;
that

that a recovery could not be suffered of a town, and that so many acres by estimation was uncertain. 2d. That others were described thus, "all that part of the town and lands, &c. now or late in the tenure of A. B." which was vague and uncertain. 3d. That two parcels were described as "containing a plough land," which was also vague and uncertain.

In respect of the premisses in the city he objected, that they were all demanded by the description of "messuage or tenement," which was uncertain, and also as being said to be "now or late in the tenure, &c." he insisted that a recovery has no effect until execution, therefore the description of the premisses should be so certain that the sheriff may know how to execute it, and if bad in ejectment, *a fortiori* in a *præcipe*.

Mr. *Alleyne* for the defendant in error, said, he should consider, 1st. What degree of precision was required by the register to the description of lands demanded in a *præcipe quod reddat*. 2dly. What indulgence was to be given to a common recovery, as a conveyance and common assurance.

assurance. 3dly. Whether from the locality of these particular lands the descriptions were not sufficient. 1st. It was a general rule, that the form of the register must be followed; but there were cases that admitted of a deviation from it. The general principle upon which all forms were founded, and upheld, was, that the defendant might know what he was to defend; and therefore whenever the term used, either in respect of the quantity or the quality, was sufficiently certain and notorious to answer that purpose, it would be good, though not particularly named in the register.

1 Rol. Rep.
165.

2dly. Great favour was to be shewn to common recoveries, because they were now a species of conveyance and common assurance of land. They were not like the cases cited, most of which were cases in ejectment, which are adversary suits, and where the objections arose in consequence of some essential defect which was fatal. But a common recovery was in the nature of an amicable suit, which admitted of a greater latitude, and any description that would be good in a deed, would be good in a common recovery.

5 Rep. 40.
Poph. 22.

3dly. With

3dly. With regard to the local situation of lands in *Ireland*, it had always been understood that the judges of *Ireland* knew the description of lands in that country better than the judges here, and therefore credit ought to be given to their knowledge. It was expressly held in 2 *Roll. Rep.* 166. 1 *Stra.* 71. & *Burr.* 623, which last case in principle answered all the objections that had been made.

Another argument arose upon the statutes of Jeofails, which was, that being after verdict, they were now too late.

As to the objections made to the particular descriptions of these lands, 1st. The word "town" in *Ireland* did not mean, as it does here, houses inhabited, but was merely a technical description of a particular district, and is notorious there. 2dly. With respect to the uncertainty of "so many acres by estimation," it was sufficient if the general boundary was known, it was not necessary that the precise measure should be accurately and exactly ascertained: and as to the term "land" in legal acceptance, it always meant arable. 3dly. The term messuage or tenement does not stand

stand alone, but is accompanied with other words descriptive of its situation, which render it sufficiently certain for the sheriff to deliver possession, besides it was the same description that was used in the deed of settlement, by which the estate was intailed; therefore, even if the descriptions were more doubtful, the court would make such a construction as would support them.

2 Mod. 233.

Lord *Mansfield*.—The consequences of those objections are so great; they are so void of the least glimmering of reason and common sense; and it would be attended with such vast inconveniencies to the public in many cases, without a possibility of doing good in any, if in common recoveries, which are a species of conveyance and common assurance, such nice exceptions were to prevail; that the strictest proof of their being founded in law is necessary, to induce the court to overturn a recovery on such grounds.

By the settled law of the land, men by deeds may fetter their estates; but tenant in tail when of age may unfetter them, observing a certain form. In this case there can be no doubt of the meaning of the tenant

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nant in tail, or his power, to unfetter the estate. The only question is, whether he has done it agreeable to the proper form; that is, whether he has described the premises with sufficient certainty. Now the description which he has used, is the identical description in the deed which created the fettering; and the objection which is made, is not so much that that description is uncertain; as that six or seven hundred years ago, in an adverse action, there was a doubt whether such an objection would not have lain; and therefore the defendant would make the same objection and raise the same doubt now. But a common recovery is not an adverse action. It is said that "all that messuage or tenement with the appurtenances, situate in the lane between the two abbey gates, now or late in the occupation of J. C. his under tenants or assigns in the county of the city of *Limerick*," is too vague and uncertain. But one must look with a microscopic eye to discover, that a messuage or tenement, &c. is so uncertain a description, as that the sheriff, or any other person, could not know how to find the premises by it; and the objection can only be made by a person who pores over the syllables of the words.

The

The objections are of two sorts, and I have no doubt as to either. 1st. That the premises in the county are demanded thus: "all those the *castles*, *towns*, and *land*, containing by estimation, &c." which it is argued is uncertain both in respect of quality and quantity. As to that it is admitted, that, "*castle*" is a good description in *England*. "*Town*," was determined to be a good description in *Cottingham v. King*, 1 Burr. 623. and "*land*," means *arable* land.

The next objection is, that the premisses in the city are described thus: "all that messuage or tenement, with a garden or meadow thereto belonging, situate, &c. and now or late in the occupation of, &c." which it has been contended would be a bad description in ejectment. There are many cases in ejectment which have gone very far indeed: And therefore the doctrine of those cases ought not to be extended. As to the authority in 3 *Wils.* 23. which would have great weight on account of its being so recent, the judges in that case decided against their own private opinion and inclination, because they held themselves bound by authority. But there,
the

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the words were only *messuage or tenement*, without any other description. Here there are other words, "with the appurtenances" and a garden, &c." which shew that "messuage or tenement" are two words for the same thing: and that both mean a dwelling house.

But this is not any fundamental ground of determination in the present case. What I ground my opinion upon is, the principles laid down in *Dormer's case*, 5 Co. 40. b. reported also in *Popham* 23; and the distinction the court there take, between adverse actions and common recoveries; which at that time were become a common assurance, and conveyance of lands, &c. and which the court say, "being also" made by *assent* between the parties, shall, "and always have had a different exposition" from what is given to a recovery by "pretence of title, or to the proceeding in" any other real action to which they are "not to be compared; therefore a com-
mon recovery may be suffered of an ad-
vowson, common in gross, warren, and the
like, and the intent of the parties shall be
observed." Now the objection in this case is an objection to the very same description

scription as is used by the ancestor in the deed which created the entail. The sole object of the recovery is to unfetter the premises so entailed; and therefore I will not depart from this antiently established principle to do such cruel injustice, both against the intention of the parties, and against public convenience. Not one precedent has been cited where such an objection has been held good in the case of a common recovery. But a case of a fine has been cited where it was allowed, and from thence it has been argued by analogy, that it is bad in a common recovery; but that argument does not hold: his lordship then cited the case of *Addison v. Otway*, and said—this decision is an instance of liberality that would not have been adopted or followed in an adverse *præcipe*. So in many other instances; as an adowson, for which no adverse action will lie, but a common recovery will; therefore as the distinction between amicable and adverse suits exists; as the inconveniencies of avoiding the recovery would be great, as no precedent in point is produced, and there is no possibility of doubt about the intent of the parties, I am clearly of opinion, that the

Ante f. 115.

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judgment of the court of King's Bench in *Ireland* ought to be affirmed. The other judges concurred with his lordship, and the judgment was affirmed.

CHAPTER VIII.

Of the Parties to a Common Recovery.

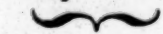
117. **A** Common recovery having from its origin been considered as a common assurance, or conveyance, by which lands were transferred from one person to another, and the default and admission of judgment by the tenant and vouchee being as much their voluntary act as if they had conveyed the land by feoffment and livery, or any other act in *pais*: It was determined, that all those whom the law enables, in other instances, to dispose of their property, and who are of full age and sufficient understanding, should have power to suffer a common recovery.

*Who may
suffer a Reco-
very.*

118. A married woman may join her husband in suffering a common recovery, which will bind her as fully as a fine, and for the same reason. And whenever a husband and wife appear in the Court of Common-Pleas to suffer a common recovery, the wife is always privately examined

*Married wo-
men.
2 Rep. 74. 78.
10 Rep. 43.
Plow. 504.*

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Ante, f. 65.

as to her consent. And where a warrant of attorney is acknowledged before commissioners appointed by writ of *dedimus potestatem de attornato faciendo* by a husband and wife, the commissioners are positively directed by a rule of court to examine the wife separately and apart from her husband as to her free and voluntary consent to the suffering such recovery.

Aliens.

4 Leon. 84.

119. An alien may suffer a common recovery, for he is a good tenant to the *præcipe* until office found.

Who are disabled from suffering Recoveries.

120. In enumerating the persons who are disabled from suffering a common recovery, I shall begin with those whose disability arises from the rules of the common law; and then proceed to those whose disabilities are created by particular acts of parliament.

The King. —
Pigot 74.
Plowd. 244.
Cro. Car. 96.

121. The King cannot suffer a common recovery, for if he does, he must either be tenant or vouchee; and in both cases the demandant must count against him, which the law does not allow.

122. Infants

122. Infants are not capable of suffering common recoveries, on account of their want of understanding; although if an infant is permitted to suffer a common recovery in person, he must, as in the case of a fine, and for the same reason, reverse it during his minority; which must be tried by inspection of the judges, otherwise the recovery will bind him for ever afterwards. But if an infant suffers a common recovery, in which he appears by attorney, he may reverse it at any time after he has attained his full age, as it may be tried by a jury, whether he was an infant or not when he appointed an attorney. The reason is, because an infant is not presumed to have sufficient understanding to choose a proper person as his attorney, and the law will not put it in his power to hurt himself; for if he is deceived and prejudiced by the recovery, he can have no remedy against his attorney.

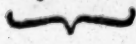
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Infants.
10 Rep. 43. a.
Cro. Eliz.
323.
Raby v. Robinson. 1. h. 325.
21 Vin. Ab.
3. 70. H. 1.
196. Cro.
Chas. 307.
Co. H. 1.
131. a.

Ante f. 62.

Thus where a writ of error was brought to reverse a common recovery, and the error assigned was, that one of the vouchees was a feme covert, and under age, and that she appeared by attorney. It was determined that the recovery should be reversed,

Stokes v. Oliver.
5 Mod. 209.

Chap. VIII.  although the woman had attained her full age, because it might be tried by a jury, whether the warrant of attorney was made by a person under age or not.

10 Rep. 43.
Cro. Eliz.
471.
Godb. 161.

123. It was formerly doubted, whether a common recovery bound an infant who appeared by his guardian; and the practice therefore was, when an infant intended to suffer a common recovery, that he and his guardian should petition the king to grant letters under the privy seal to the judges of the court of Common Pleas, directing them to permit such infant to suffer a common recovery. But it was still in the discretion of the judges to permit the infant to suffer it, or not, according to the circumstances of his case; and if the judges, upon examination, found it necessary, or that it would be advantageous to the infant that he should suffer a common recovery, they then admitted persons of known integrity and fortune to appear as guardians to the infant, and to suffer a recovery for him in court.

Blount's
Case.
Hob, 196.
Jenk. Cent.
299.

The Earl of *Devon* devised his estates to his son the Earl of *Newport*, who was then an infant of the age of eighteen; and among

mong the possessions of the said Earl was the manor of *Wansted*, which he left to his son in tail, with several remainders over. The Earl of *Devon* was greatly in debt, and had appointed certain honourable persons to be guardians of his son, who found it necessary to sell the said manor of *Wansted* for payment of the Earl's debts. They therefore petitioned the king that he would write to the judges of the Common Pleas, that a common recovery should be suffered of this manor, which his majesty did. And upon examination of the infant privately, and of his guardians in court, and of the circumstances of the case, a common recovery was accordingly suffered, in which the Earl of *Newport* and his guardians, were vouched in person.

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Sir H. Mackworth's Case,
1 Vern. 461.
S. P.
Cro. Car.
307.

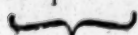
124. The judges of the court of Common Pleas may however refuse to permit such a recovery, if the reasons for an application of this kind do not appear to them sufficient.

1 Ld. Raym.
113.

Sir *John St. Alban*'s being of the age of nineteen, his sister, who was next in remainder to him, and also his heir at law, married one of his footmen. He petitioned

Sir J. St. Alban's Case,
Salk. 567.

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the king for leave to suffer a common recovery, who referred it to the judges of the Common Pleas, before whom several precedents of recoveries, suffered by infants upon privy seals, were cited. The judges observed that seven of the petitions were by fathers upon the marriage of their sons, and an equal recompence given, whereas here was neither father nor marriage in the case. They said this case had been carried too far already, and therefore would not allow it.

Cro. Car.

307.

1 Mod. 48.

Notwithstanding all these precautions, a common recovery suffered in this manner may be reversed by writ of error.

Common recoveries suffered by privy seal, are now disused, and private acts of parliament are universally substituted in their stead.

Perk. 12.

3 Burr. 1804.

125. If an infant is permitted to suffer a common recovery, he must make a tenant to the *præcipe* by feoffment, and give livery of seisin in person, by which means the feoffment is only voidable, whereas if the infant appointed an attorney to give livery of seisin for him, the feoffment would then be absolutely void.

126. An

126. An infant trustee may join in a common recovery, in consequence of the statute 7 *Ann. c. 19.* if he is directed to do so by the court of Chancery.

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Fines s. 190:

Thus, where a person who was a trustee, devised all his estates to his son, who was then an infant, in tail, with remainders over. A petition was preferred, that the infant to whom the trust estate was devised might be ordered to convey by recovery, pursuant to the statute 7 *Ann. c. 19.*

Ex parte
Johnson,
3 Atk. 559.

Lord *Hardwicke* at first thought there must be an application for a privy seal, but the act being general, "that the infant "shall convey lands, as the court, by order "shall direct:" his lordship made an order that the infant should convey by a common recovery.

127. Ideots, lunaticks, and generally all persons of none-sane memory, are disabled from suffering common recoveries, as well as from levying fines; though if an ideot or lunatick does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an ideot or lunatick. But if he appears by attorney, I presume

Ideots, Lunaticks, &c.

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presume such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of ideocy may be tried by a jury, with as much propriety, as the fact of infancy.

Vide infra.

In a celebrated case which was lately determined by the House of Lords of *Ireland*, the majority of the judges were of opinion, that the caption of a warrant of attorney, taken by the chief justice of the court of Common Pleas for the purpose of suffering a common recovery, was not conclusive evidence of the capacity of the person acknowledging such a warrant of attorney. A full state of this case will be given in the Appendix.

Sir B. Wentworth's Case,
intra. 355.

128. Although no averment of ideocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted, to invalidate a deed to make a tenant to the *præcipe*, for suffering a common recovery; and the recovery has in that manner been set aside.

129. By

129. By the Common Law, if a *præcipe* had been brought against a tenant for life, and a recovery suffered, it would have barred the persons in remainder; but this being justly considered as a grievance, it was enacted by the statute 32 *Hen. 8. c. 31.* that all common recoveries suffered by tenants for life, without the consent of the persons in remainder or reversion, should be totally void.

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Tenants for Life.

Pigot 18.

130. If after this act a tenant for life had made a lease for years, and the lessee had made a feoffment, and a *præcipe* had been brought against the feoffee, and he had vouched the tenant for life, such a recovery was not within the statute, because the tenant for life was not then seised of the estate for life.

Pigot 83.

To remedy this the statute 14 *Eliz. c. 8.* was passed, reciting, that several tenants in tail after possibility, and other tenants for life or lives, had suffered common recoveries, to the prejudice of those in remainder or reversion; it was therefore enacted, "that all such recoveries had or
"prosecuted by covin against any such
"particular tenant, or against any other,
"with

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“ with voucher over of such particular tenant, should, as against all persons in remainder or reversion, be utterly void, and of no effect. Provided that that act should not extend to recoveries by good title, or to recoveries by assent and agreement of the persons in remainder or reversion, so that such assent appeared of record in any of her majesty’s courts. And it was thereby further enacted, that the statute 32 Hen. 8. should be repealed.”

Wifeman v.
Crow, Cro.
Eliz. 562.

131. In consequence of the last proviso in this statute, a tenant for life may join with the persons in remainder or reversion in suffering a common recovery, without incurring a forfeiture.

*Women seized
of Dower or
Jointures.*

4 Reeves
140.

132. Before the statute of Uses a considerable part of the landed property of the kingdom was in the hands of feoffees to uses, by which means women were frequently defrauded of their dower, a woman not being dowable of an use; so that it became usual on every marriage for the friends of the wife to make the intended husband procure a conveyance of the legal estate from his feoffees to himself, and his intended wife for life, or in tail, in which latter

latter case the wife used sometimes to alienate the estate after her husband's death, by fine or recovery, and so give it away from her issue and her husband's family.

To prevent this practice, a statute was passed 11 *Hen. 7. c. 20.* by which it was enacted, "that any woman who had any estate in dower, or for term of her life, or in tail, jointly with her husband, or only to herself, or to her use in any manors, &c. the inheritance or purchase of her husband, or given to the said husband and wife in tail, or for term of life, by any of the ancestors of the said husband, or by any other person seised to the use of the said husband or of his ancestors, and should hereafter, being sole, or with any after-taken husband discontinue, alien, release, or confirm with warranty, or by covin suffer any recovery of the same, that all such recoveries, discontinuances, &c. should be utterly void and of no effect, and it should be lawful for the person in remainder or reversion to enter immediately."

This act is confirmed by the statute 32 *Hen. 8. c. 36. s. 2.* which provides, that no fine

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fine levied by any woman of any such estate as is mentioned in the statute 11 Hen. 7. shall be of any effect.

133. These statutes having been made to prevent an injury, have always been construed liberally, and therefore every kind of estate created by the fine of a jointress, is held to be void against the heir.

Pigot v. Palmer,
Moor 250.
3 Rep. 51. b.
Jenk. Cent.
6. c. 97.
2 Leon. 168.
3—78.

Thus, where a tenant in tail, who was a jointress within this statute, accepted a fine *sur cognizance de droit come ceo* from a stranger, who granted and rendered the lands to the jointress for 100 years; it was adjudged that this was a forfeiture, for otherwise the intention of the statute might, by practices of this kind, be entirely defeated.

134. With respect to the estates which have been deemed to be comprehended in this act, the same liberality of construction has been adopted, and therefore it has been determined, that whenever an estate has been derived either from the husband himself, or from any of his ancestors, it is protected by this statute.

Anon. Mo.
93. pl. 231.
3 Rep. 50. b.
Cro. Eliz.
513. S. P.

Thus, where the ancestor of the husband made a feoffment in fee, upon condition that

that the feoffees should re-convey to the husband and wife in tail, this was adjudged to be such an estate as is intended by the statute.

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135. So where a man and a woman being joint-tenants in fee of a manor, intermarried, and afterwards levied a fine thereof to a stranger, who rendered it to them in tail. After the death of the husband the wife married again, and joined her second husband in levying a fine. It was held that this fine was void, as to the moiety which had originally been the estate of the husband, because it was protected by this statute.

Laughter v.
Humphrey,
Cro. Eliz.
524.

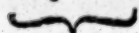
136. In the same manner where one brother in consideration of a marriage had between his brother and M. covenanted to stand seised to the use of himself for life, and after to the use of his brother and his wife for their lives. This was adjudged to be a jointure within the statute 11 Hen. 7. as moving from the ancestor of the husband.

Sharrington
v. Strotton,
Plowd. 300.

137. Although lands are settled in consideration of money given by the wife or her

her

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her friends, yet if the marriage appears to have also constituted a part of the consideration, the estate will be within this statute.

Villars v.
Beaumont,
Dyer 186. a.
Bendl. 29.
Keilw. 208.
a.
Mo. 93.
p. 231.
Vide infra.
Kirkman v.
Thompson,
S. P.

Thus, where a grandfather bargained and sold lands to J. N. for thirty years, remainder to himself and his wife for life, remainder to his son for life, remainder to his grandson, and one S. the daughter of J. N. and the heirs of their two bodies begotten; after which followed these words: "for the which manor, bargain, and other the premisses, the said J. N. covenants to pay the said sum of 70*l.* at certain days, &c." the son afterwards married S. who survived him, and with a second husband levied a fine of those lands. The jury further found *dehors* the indenture, that the indenture and bargain and sale were as well in consideration of the marriage as of the money: it was held by three judges against *Dyer*, that the fine was void, for they expounded the words, "given by the ancestors, &c." to be any lands assured to the woman in jointure, either for money (as few marriages are made without it) or else freely.

Vide Cop-
land v.
Piatt, Sir W.
Jones 254.
Cro. Car.
244.
Jenk. 310.
p. 20.

138. A trust estate, or an equity of redemption is within this statute, as well as a legal estate, for uses are expressly mentioned in the statute, and a trust is now, what an use was then.

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2 Vern. 489.
1 Ab. Eq.
220.

139. With respect to the estates which are not comprehended within this statute, as the object of it was only to prevent women from alienating those lands which were settled on them by their husbands, it therefore does not extend to any lands which were originally the property of the wife, or which were derived from any of her ancestors.

Thus, where husband and wife seised of lands in right of the wife, levied a fine *sur cognizance de droit come ceo*, and took back an estate to the husband and wife in tail general, remainder to the heirs of the wife. The husband died, leaving issue a son, the wife married a second husband, with whom she joined in levying another fine, on which the son by the first husband entered for a forfeiture by the 11 Hen. 7.

Eyston v.
Studd.
Plowd. 463.
1 Inst. 366. a.

It was determined, that the last fine was no forfeiture by this statute; for as the
VOL. II. O estate

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estate was originally the property of the wife, it would be unreasonable to restrain her from disposing of it, and quite foreign to the intent of the act; for although it might, within the letter of the act be considered as the purchase of the first husband by the first fine, yet it was not so in reality, as the lands were originally derived from the wife.

Palmer 217.

140. Husband and wife sold lands which were the estate of the wife, and purchased other lands with the money, which were settled on the husband and wife in tail. This was agreed *arguendo*, to be a jointure within the statute, because the money was a chattel vested in the husband, which he might have disposed of as he pleased, and therefore when he laid it out in the purchase of lands, the law will consider them as purchased by the husband.

141. A voluntary gift by a stranger to a husband and wife, is not within this statute.

Ward v.
Walthew,
Cro. Jac.
173.

The bishop of *Exeter* made a voluntary gift of lands to one *Turner* his servant, and *Sybill* his wife, and to the heirs of their

two

two bodies. The husband died, and the wife levied a fine of those lands: it was resolved that this was not a jointure within the statute 11 *Hen.* 7. for the lands did not come from the husband, nor from any of his ancestors.

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1 Brownl.
137.
Yelv. 101:

142. If lands are limited by a husband, or by any of his ancestors, to the wife in tail general, without any limitation to the issue or heirs of the husband, such an estate is not protected by the statute 11 *Hen.* 7. because the object of that statute was to prevent wives from prejudicing the issue or heirs of their former husbands; but where no remainder is limited to such persons, no prejudice can be done them.

Thus, where a man seised in fee devised lands to his wife in tail general, remainder over to a stranger; after the husband's death, the wife married a second time, and suffered a recovery. The daughter of the first husband entered for the forfeiture, but it was determined, that although this case was within the letter of the statute, yet it was not within the intention of it, the remainder being limited from the heirs of the husband to a stranger.

Foster v.
Pitfal.
Cro. Eliz. 2.
Idem. 524.
1 Leon. 261.
Com. Rep.
369.
Hughes v.
Clubb, S. P.

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4 Rep. 3. b.

Gilb. Ten.

181.

Harrington

v. Smith.

2 Sid. 41. 73.

4 Mod. 45.

A jointure limited to a woman in fee is not within this statute for the same reason.

143. Copyhold estates are not comprehended within this statute, for an entry being given to the heir of the husband, he would thereby become tenant without being admitted by the lord. Besides, a copyhold estate is not within the words or intention of the statute, for it cannot be discontinued or conveyed in any other manner than by surrender.

144. This statute was originally construed to extend to a fine levied both by the husband and wife.

1 Inst. 365. b.

Thus, where a man seised of lands in fee, levied a fine to the use of himself for life, remainder to the use of his wife, and the heirs male of her body, begotten by him, for her jointure. Afterwards the husband and wife levied a fine, and suffered a common recovery of those lands, and died leaving issue, who entered by force of the statute 11 *Hen.* 7. and the entry was held lawful; although, as Sir *Edward Coke* observes, this case was out of the letter of the statute, for the wife neither levied the fine

when sole, nor with any after-taken husband, but being within the mischief, it was adjudged to be within the remedy of the statute, the intention of which was to prevent children, who were provided for by such jointures, from being disinherited.

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145. The doctrine established in this case has however been contradicted by a more modern determination.

A father, in consideration of the marriage of his son, and of 200 l. portion, covenanted to convey lands to the use of the son and his wife, and of the heirs of the body of the wife, remainder to his own right heirs. A conveyance was made accordingly, and the husband and wife joined in levying a fine of the lands. It was resolved, first, that this was a jointure within the intent of the statute, although part of the consideration was money paid by the father of the wife to the father of the husband. 2dly. That the fine did not operate as a forfeiture, either within the words or intention of the statute, for the wife was not sole, nor was the alienation with an after-taken husband, and the object of the statute was only to provide against the disinheritance of

Kirkman v.
Thompson,
Cro. Jac. 474.
Pigot. Re-
cov. 81.

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the heirs of the husband contrary to his intention.

Doct. & Stud.

Dial. 1. c. 31.

Lincoln. Col.

Case.

3 Rep. 58.

146. By the 8th and 9th sections of this statute it is provided, that it shall not extend to any recovery to be had with the heirs next inheritable to the woman, or where the person next in remainder consents to the same, provided such consent appears on record.

3 Rep. 61. b.

147. Sir *Edward Coke* says, that if a man makes a feoffment to the use of himself and his wife in tail, remainder to the use of the husband in fee, and has issue a daughter, and dies leaving his wife ensient of a son, whereby the reversion in fee descends to the daughter; if the wife and daughter, before the birth of the son, join in levying a fine, or suffering a common recovery, the son may enter and take the benefit of this statute.

148. The right of entry which is given by the stat. 11 *Hen. 7.* is not confined to the heir of the husband, but is extended to the person to whom the inheritance is to go after the decease of the woman, whether he

he be the heir of the husband, or a stranger Chap. VIII.
deriving under the heir of the husband.

Thus where Sir *Richard Bridges* made a feoffment of lands to trustees, on condition that they should give back the same to him and his wife, and to the heirs of their two bodies begotten, remainder to the right heirs of Sir *Richard*, which was accordingly done. Sir *Richard* had issue by his wife a son, named *Anthony*, and died. *Anthony*, in the life-time of his mother, conveyed the lands by fine to Sir *G. Brown* in fee; the wife afterwards made a lease for three lives, not warranted by the stat. 32 *Hen. 8.* whereupon Sir *G. Brown* entered, and the question was, whether his entry was lawful within the stat. 11 *Hen. 7.*? It was resolved, that the entry of Sir *G. Brown* was lawful, because he was the person who had the immediate right to the inheritance after the death of the wife.

Sir G.
Brown's case
3 Rep. 50.
Lynch v.
Spencer, S.C.
Cro. El. 513.

149. By the common law, if a husband, seized of lands in right of his wife, had levied a fine of them without her concurrence, it operated as a discontinuance, by which means the wife was barred of her entry after the death of her husband, and

Husbands
seized jure
uxoris.

Lit. f. 594.
731.
1 Inst. 326. a.

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was obliged to bring her writ of *cui in vita*; and therefore *Littleton* observes, that the judges would not permit a man to levy a fine alone of his wife's estate.

This produced the statute 32 *Hen. 8. c. 28. §. 6.* by which it is enacted, "That no fine, feoffment, &c. by the husband only of any manors, being the inheritance or freehold of his wife during the coverture between them, shall in any wise be, or make a discontinuance thereof, or be prejudicial or hurtful to the said wife, or her heirs, but that the same wife, or her heirs, shall lawfully enter into such manors, &c. any such fine, feoffment, &c. to the contrary notwithstanding; fines levied by the husband and wife, whereunto the said wife is a party and privy, only excepted."

1 *Inst.* 326. 2.
2 *Inst.* 681.
8 *Rep.* 71.
Greney's
Case.

150. This act having been made to suppress a wrong, and to give the injured party a more speedy remedy than what the common law afforded, it has been construed liberally; so that where lands were given to a husband and wife, and the heirs of their two bodies, and the husband alone levied a fine thereof and died, the entry of the wife

was



was adjudged to be lawful, although the words of the act are, "being the inheritance of freehold of the wife;" whereas, in this case, the lands were as well the inheritance and freehold of the husband as of the wife.

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151. Where husband and wife are joint purchasers in tail, remainder to the wife in fee, and the husband alone levies a fine and dies, this is an alienation within the statute.

Dyer 162. p. 48.

152. If the husband alone makes a feoffment of his wife's land, and afterwards he and his wife are divorced *causa præcontractus*, yet the wife may enter after the death of her husband, for it is sufficient that she was his wife *de facto* at the time of the alienation.

1 Inst. 326. z

153. Although the king be not named in this act, yet he is bound by it as well as a subject; so that if a husband alone levies a fine of his wife's land to the king, still the wife may enter after the death of her husband.

1 Inst. 681. Beaumont's Case.

154. If the wife dies before entry, her issue may enter; and if she has no issue, then

1 Inst. 326. a.

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then the person in remainder or reversion may enter by the very words of the statute.

Moore 596.

155. This statute does not extend to copyholds, for the words of it only allude to estates which pass by common law conveyances; and if it were construed to comprehend copyholds, the heir of the wife would become tenant without being admitted by the lord.

*Ecclesiasticks
seised jure
ecclesiæ.*

156. Ecclesiasticks seised in right of their churches are prohibited from suffering common recoveries, upon the same principle that they are prohibited from levying fines.

CHAPTER IX.

Of the Amendment of Common Recoveries.

157. COMMON recoveries being judicial proceedings, must be carried on according to the established forms and solemnities of a suit at law; but however, as they are suffered with the consent of all the parties, and considered as common assurances, they have always been construed in the most favourable manner and therefore the court of Common Pleas has, in many instances, allowed them to be amended.

158. Thus, where an evident mistake has been made in the names or descriptions of the parties, the court has allowed it to be amended.

A common recovery was agreed to be suffered, wherein *John Chapman* and *Richard Elton* were to be demandants, and by the mistake of a clerk, the writ of entry was

Chapman v. Bacon.
Pigot 170.

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was sued out in the name of *John Chapman* and *John Elton*; the recovery was allowed to be amended.

Pigot 170.

159. A warrant of attorney was given, in order to suffer a common recovery, by *William Reynolds* and *Hester* his wife; the serjeant who took the warrant of attorney, certified the same to be given by *William Reynolds* and *Margaret* his wife, and the *mittimus* and transcript were made of a warrant given by *Margaret*, and the recovery was entered accordingly, but it was allowed to be amended.

Thurban v.
Pantry.
Pigot 171.

160. A common recovery was suffered by *R. Callow* and *Ux'*, without mentioning the name of the wife, and it was allowed to be amended.

Mayre v.
Coulthaid.
2 Black. R.
1230.

161. A recovery was allowed to be amended, by changing the words *Ann* the wife of *Henry Goodwin* to *Elizabeth*, in conformity to a fine and deed to lead the uses.

Lord and
Biscoe.
Barnes 24.

162. A rule was made absolute to amend a recovery by transposing the names of the demandant and tenant pursuant to the deed,

deed, making a tenant to the *præcipe* by the recovery. *Biscoe* had been demandant, and *Lord* tenant; by the deed, *Lord* was to be demandant, and *Biscoe* tenant.

163. In the same manner, where a mistake has been made in the description of the estates intended to be comprehended in a recovery, it has been allowed to be amended.

A common recovery was agreed to be suffered of lands in *Alphampton* and *Magna Hermney*, in the county of *Essex*; but by mistake the same was suffered of lands in *Alphampton* and *Lamarsh*, and it was ordered to be amended.

Skinner v. Laud.
Pigot 171.

164. A common recovery was agreed to be suffered of lands in *New Church*, *Levington*, and *Mersham*; but *New Church* was totally omitted. Upon examining the deed to lead the uses, it was ordered to be amended.

Whitwell v. Matters.
Pigot 172.

165. A common recovery was agreed to be suffered of two messuages and one garden in *London*; but being only suffered of one messuage, it was allowed to be amended.

Brooke v. Biddolph.
Pigot 172.

166. The

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Jenkinson v.
Staples.
Pract. Reg.
C. P.

Henzell v.
Lodge.
2 Black. R.
747.
3 Will. R.
154.

Watson v.
Cox.
2 Black.
R. 1065.

166. The *præcipe* and writ of entry in a common recovery were allowed to be amended, by adding the names of several parishes which had been omitted.

167. The deed to lead the uses of a recovery mentioned "all the vouchee's lands" in *Aldenham*, or elsewhere, in the county "of *Kent*, in the occupation of *Robert Goddard*." *Robert Goddard* rented one entire farm of the vouchee (all sworn to be intended to pass by the recovery) being principally in the parish of *Aldenham*, but part thereof lay in the parish of *Mersham*, which was not known to the parties when the recovery was suffered. The court, after taking a day to consider of it, allowed the recovery to be amended, by inserting the word *Mersham*.

168. On a motion to amend a recovery of lands, &c. in the town of *Kingston on Hull*, by inserting the words *in Myton*, and the words *and county*, thereby making the description of the lands to be "in *Myton*, "in the town and county of *Kingston upon Hull*."

The deed to lead the uses described the parcels to be situate "in the lordship of
" *Myton*,

"*Myton*, in the county of *York*, or in the
"town and county of *Hull*, lately pur-
"chased of *Thomas Yates*." And it was
proved by affidavit, that one *William*
Crowle purchased of *Thomas Yates* the land
intended to pass, being in the township of
Myton, in the town and county of *Kingston*
on Hull, and in 1728 settled them succes-
sively on *George* and *Richard Crowle* in tail:
that *George* died without issue, and *Richard*
being then tenant in tail, and having no
other lands in *Kingston on Hull*, did, in
1754, suffer this recovery. The court di-
rected notice to be given to the tenant, and
on his consenting made the rule absolute.

169. A recovery, which had been suf-
fused nine years before, was ordered to be
amended, by putting the word *Trul*, the
the name of a vill, into its proper place,
according to the deed of uses. *Trul* had
been by mistake put into the recovery as
an advowson, not as a vill where land lay.
It was objected against this amendment,
1st. that the estate was in trustees at the
time of the recovery, and consequently, the
trustees not being parties, there was no
good tenant to the *præcipe*. 2dly. That
the lands were customary tenure. 3dly.
That

Loggin and
Pullen.
Barnes 21.

That the parties who suffered the recovery were volunteers.—4thly, That the wife of *Pullen*, the vouchee, was dead, and a recovery could not then be suffered to bar the remainders.

The court said, they would not enter into the question, whether in equity recoveries of trust estates would bar legal remainders, or into the other objections. When the recovery was amended, *valeat quantum valere potest*, the intention of the parties was the foundation for the amendment. The transaction appeared to be fair, and without fraud or collusion. The principle upon which they went, was the statute 8 *Hen. 6.* to amend the misprision of the clerk. A *præcipe* was the curfitor's instruction for an original writ. A deed of uses was the clerk's instruction for a recovery. The *præcipe* and deed were the things to amend by; and Mrs. *Pullen* being dead, an amendment was the only remedy left.

170. The court will not grant leave to amend a recovery on affidavit only; it must appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment.

In

In a recovery, a farm called *Thieffside*, otherwise *Thievishead*, was described to be situated in the forest of *Inglewood*, in the parishes of *Heskit in the Forest*, and *St. Mary's, Carlisle*, or one of them, in the county of *Cumberland*. It was afterwards discovered that the whole of the said farm was not within the parishes of *Heskit in the Forest*, and *St. Mary's, Carlisle*, as described in the recovery; but that part of it was in the parish of *Lazonby*, in the county of *Cumberland*.—It was moved to amend the recovery by inserting the words “the parish of *Lazonby*” on an affidavit of the owner of the lands, the vouchee, stating as above, and that he meant to include all his estates in the county of *Cumberland* in the recovery, and that he did not know when he suffered the recovery that any part of the said farm was in the parish of *Lazonby*.

The court would not on this affidavit alone, grant leave to amend; but upon reading the deed to lead the uses, there was found the following clause: “and all other
“ the estates, manors, or lordships, messu-
“ ages, lands, tenements and hereditaments
“ whatsoever, situate, lying and being in
“ the county of *Cumberland*.”—This was
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holden by the court sufficient to warrant an amendment, as it appeared on the face of the deed itself, and the rule for amendment was made absolute.

171. No amendment, however, will be allowed in the description of the estates comprehended in a recovery, where the recovery, as it stands, has lands of the vouchee to operate upon.

Acton v.
Baldwin.
2 Black.
R. 874.

Thus where a motion was made to amend a recovery, by striking out the city of *Litchfield*, and inserting the county of *Stafford*, with other consequential amendments, wheresoever the names of the county and sheriff occurred, and also by inserting *Longden* (the name of a vill) after *Abnall*, another vill named in the recovery.

The court observed, that it was a gross mistake in the attorney concerned in suing out only one recovery instead of two, and that they would willingly give the parties all the assistance they legally could to effect their evident intent, but it was beyond their power. In the cases of amendments which had been cited, the party had no estate in the vill, or county, struck out; therefore,
quoad

quoad hoc, the recovery had no operation; but the present application was, to annul a valid recovery in the city of *Litchfield*, which had operated upon lands therein for near forty years, and to substitute in its stead a recovery in the county of *Stafford*. The motion was refused.

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172. Where there has been a mistake of the clerk in the words of the judgment, the court has ordered it to be amended.

Thus there are two instances where, upon motion to amend a recovery, by striking out the words *it is adjudged*, and inserting the words *it is considered*, the court have ordered it to be done, as such an amendment related to the act of the court in giving judgment.

Barnes 20.
22.

173. Amendments are also allowed in the writ of seisin, and the return thereof.

Thus where a writ of seisin was rightly directed to the sheriffs of the city of *York*, but not returned in the name of any sheriff, though a mistaken return in the singular instead of the plural number was indorsed on the writ. The prayer of seisin and re-

Wilton and
Fairfax,
Barnes 23.
Watson and
Lockley.
2 Will. R. 2.

P 2

turn

turn of the writ were ordered to be first amended, and then the roll and exemplification accordingly.

174. No amendment is allowed in a common recovery, unless there is an evident mistake of the clerk, or something to amend by.

Ante f. 83.
Barnes 17.

Thus in the case of *Wynne* and *Wynne*, an application was made to the court of Common Pleas to amend the *teste* and return of the writ of entry, and a rule to shew cause. The court, after hearing counsel on both sides, and consideration, was of opinion, that all amendments must be consistent with the rules of law, and there must be something to amend by. In this case the vouchees by law could not appear until the return day of the writ of summons, and the power of attorney given by *Alithea* to appear on that day was revoked by her death in the intermediate time. By the statute 8 *Hen.* 6. original writs are amendable, if wrong, by misprision of the clerk, or where there is any thing to amend by. Here was no misprision of the clerk, the writ was made agreeable to his instructions, and there was nothing to amend by; the amendment prayed is to amend

amend in the first instance. The rule was discharged.

175. By the statute 23 *Eliz. c. 3. f. 10.* it is enacted, that no recovery suffered before that act, which shall be exemplified under the great seal, shall, after such exemplification, be in any wise amended. And by the statute 27 *Eliz. c. 9. f. 10.* no recovery suffered before that act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverfordwest*, or under the seal of any of the counties Palatine, shall, after such exemplification, be in any wise amended.

CHAPTER X.

Of the Operation of a Common Recovery in barring Estates tail, Remainders and Reversions.

176. **T**HE variety of inconveniences which were produced by the statute *de donis*, and the impossibility of obtaining a parliamentary repeal of it, have been stated in the first chapter of this essay.

These circumstances induced the judges to adopt every possible means of evading and invalidating its effect; but the progress was gradual and it was a long time before it was completely effected.

177. The first rule which the judges adopted on this subject was, that the issue in tail could not avoid the alienation of his ancestor, provided the issue was left a recompence in value by his ancestor; for the estate tail which he had alienated.

Thus,

Thus, it was determined very soon after the statute *de donis*, that if a tenant in tail lost his estate tail, and recovered over in value; such recovery in value was a good bar to the estate tail, because the issue was not prejudiced.

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10 Rep. 37.
b.
2 Black. Com.
303.

178. It was also determined upon the same principle, that a lineal warranty, with assents, was a good bar to the issue in tail. However, Sir *Edward Coke* observes, that if a tenant in tail, aliened with warranty, leaving assents to descend, and the issue in tail aliened the assents, and died, the issue of that issue should recover the estate tail, because the lineal warranty descended to him *without* assents, which shews that the issue in tail could not be barred, unless he had a full recompence in value.

Litt. f. 712.
Idem 749.
2 Reeves 134.
1 Inst. 393. b.
10 Rep. 37 b.

179. The rule, that the issue in tail could not avoid the alienation of his ancestor, provided he had a recompence in value, was still farther extended, by a decision of the judges, in 44 *Edw. 3.* by which it was determined, that if tenant in tail granted a rent-charge in consideration of a release of right, to a person who had a prior right to the estate, such a grant should bind the issue in tail, because it was made

Chap. X. : for his benefit, and the estate tail descended
 ~~~~~ to him as a recompence for the grant.

Octavian  
 Lumbard's  
 Case.

44 Ed. 3.  
 Year-book

21.

2 Reeves 136.

Thus, where a person brought a replevin for taking his cattle, the defendant avowed, for that one *Nicholas* was seised in tail of the manor of *B.* and had issue *John* and *Joan*; *Nicholas* died, *John* being then in *Ireland*; *Joan*, the daughter, entered, and died seised, leaving issue a son, named *Nicholas*, who entered; *John*, the son, having returned from *Ireland*, sued for the land, but agreed to release all his right to the estate tail to his nephew, *Nicholas*, in consideration of a grant from *Nicholas*, of a rent of 20 *l. per annum*, with power of distress. This rent being afterwards in arrear, a distress and avowry, were made on the lands charged, which were then in the possession of the issue of *Nicholas*. The court was of opinion, that as *Nicholas*, who was tenant in tail, granted this rent in consideration of a release of right from *John*, who was really intitled to the estate tail; the grant was good, and sufficient to bind his issue in tail, because the estate tail descended to them as a recompence for this rent.



180. In the preceding modes of barring estates tail, it may be observed, that the recompence in value, which descended to the issue in tail, was a real and *bona fide* recompence. But in 12 *Edw.* 4. a case arose in which the judges carried this principle to a much greater length, and determined, that a nominal and fictitious recompence, descending to the issue in tail, should be an effectual bar, not only to the issue in tail, but also to all persons in remainder or reversion; and as the validity of recoveries depends even at this day on the authority and principles laid down in that case, it will be proper to state it at full length.

3 Reeves,  
326.

181. *I. B.* being seised in fee of the lands in question, gave them to one *William Smith*, to hold to him and the heirs of his body, by force of which he was seised. *William Smith* died, leaving *Humphrey* his eldest son, on whom those lands descended, who entered, and was seised *per formam doni*. *Humphrey* enfeoffed one *Tregos* of the said lands in fee, who rendered them to the said *Humphrey* and *Jane* his wife, and to the heirs of their two bodies, remainder in fee to the said *Humphrey*, by force

Taltarum's  
Case, 12 Ed.  
4. Year  
Book, 14. 19.

Vid. 13 E. 1.  
No. 1. p. 1.  
Bro. Abr. tit.  
Recovery in  
value, 19.

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force of which they were seised. Some time afterwards *Jane* died, on which *Humphrey* became sole seised of the said lands in tail; and being thus seised, one *Taltarum* brought a writ of right against *Humphrey*, and counted of his possession against him. *Humphrey* made defence, and vouched to warranty one *R. King*, who entered into the warranty, and joined the mise on the mere right; afterwards *R. King*, the vouchee made default, and departed in contempt of the court; in consequence of which, final judgement was given, that the demandant *Taltarum* should recover the lands in question against *Humphrey*, and that *Humphrey* should recover lands of equal value of *R. King*, the vouchee; *Humphrey* afterwards died, without leaving heirs of his body, and the question was, whether *Richard* the brother of *Humphrey* who was heir in tail to those lands, should be barred by this recovery?

It was determined by all the judges, that the estate tail was not barred by this recovery, because the tenant in tail was not seised of the estate tail at the time of the recovery, but of another estate; and as the recovery in value goes according to the  
estate

estate whereof the tenant was seised at the time of the recovery, and not in recompence of the estate he had not, the issue in tail could have no recompence in this case, and therefore was not barred by the recovery.

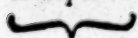
It is observable, that this case was conducted with a good deal of art; for at first sight the decision seems to be against the validity of a common recovery, in barring estates tail, but from the arguments of the judges it appeared they were all of opinion, that if the tenant in tail had been actually seised of the estate tail at the time of the recovery, the recompence in value would then have descended in lieu of the estate tail, and therefore the issue in tail would have been barred.

Pigot 9:  
3 Reeves,  
328.

All the writers on our law have dated the æra of common recoveries from this decision, although the preceding cases shew, that so early as the reign of *Edward 3.* the judges were extremely well inclined to give tenants in tail every assistance for enabling them to unfetter their estates.



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182. It is evident from this case, that the reason on which the judges grounded their original determination, that a common recovery was a good bar to an estate tail, was, because the issue in tail had a recompence in value, either real or fictitious, for the estate tail which was recovered; but as several cases arose in which the recompence in value could not possibly extend to all the estates which were barred, the judges have at different times exerted their ingenuity in inventing other reasons to support the validity of common recoveries.

2 Lev. 29.  
Freem. 363.

Thus, in the case of *Hudson v. Benson*, in *Mich. 23 Car. 2.* Lord Chief Justice Hale is reported to have said: "the recompence  
" of the value is the reason of the bar by  
" common recoveries, as to the issue in  
" tail; but not the reason why it bars, as  
" to him in remainder or reversion. But  
" the reason in this case is, because the re-  
" coveror, in supposition of law, is in of  
" the estate tail, and that in judgment of  
" law has still continuance; as at Common  
" Law, the donee, *post prolem suscitata*,  
" might have aliened and barred the donor;  
" and a common recovery is, as it were, a  
" conveyance excepted out of the statute  
" de

“ *de donis*, and the recoveror is in of the  
 “ estate which the donee had ; but the issue  
 “ in tail is barred to claim it, in respect of  
 “ a supposed recompence by the reco-  
 “ very.”

183. In Mr. *Ratcliffe*'s case, which was 1 Stra. 289.  
 argued before the Lords Delegates 6 Geo.  
 1. Mr. Baron *Mountague* observes that the  
 words of Sir *M. Hale* respecting recoveries  
 had been cited, and said, “ I never found  
 “ my opinion on the *dictums* of reporters,  
 “ in which they are very apt to mistake the  
 “ words and sense of the judges from whom  
 “ they take them ; and so it seems to be in  
 “ that case. Lord *Hale* is there reported  
 “ to have said, that the recompence in va-  
 “ lue is not the reason why common re-  
 “ coveries are bars to the remainder-men,  
 “ but because those are conveyances ex-  
 “ cepted out of the statute *de donis*. But  
 “ it is the text of *Litt. f.* 668. that if tenant  
 “ in tail suffered a feigned recovery, the  
 “ issue might falsify it in a *formedon*. This  
 “ shews that at Common Law such reco-  
 “ veries as we now make use of to bar  
 “ estates were not known ; and therefore it  
 “ would have been ridiculous in the statute  
 “ *de donis* to have excepted recoveries,  
 “ since

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“ since common recoveries were not used,  
 “ and recoveries on good title could not  
 “ be imagined to be included. If issue was  
 “ taken on the disseisin alledged in the writ  
 “ of entry, and found for the demandant,  
 “ and so the recovery on a point tried;  
 “ this at common law would bar the issue,  
 “ there lying an attain against the jury;  
 “ though where it was by default, it would  
 “ not. But afterwards another middle way  
 “ was found out and favoured by the  
 “ judges, to prevent the inconvenience of  
 “ perpetuities; and that was, where the  
 “ tenant in tail appeared and vouched over,  
 “ and the vouchee made default, and so  
 “ there was a judgment for a recompence  
 “ to one, and for the lands demanded to  
 “ the other. This judgment, though by  
 “ default, and without issue tried, was held  
 “ a bar, on account of the recompence  
 “ in value.”

Salk. 63.

184. It is extremely clear, from what  
 has been premised, that the effect and va-  
 lidity of common recoveries cannot be sup-  
 ported by any of the maxims or principles  
 of the common law, but that they are, a  
*fiat juris*, adopted for the purpose of de-  
 stroying that species of perpetuity which

was



was created by the statute *de donis*; and the numerous advantages which arose from the decision of the court, in 12 *Edw. 4.* was a sufficient justification of it (a). Besides, common recoveries have now continued so long, and their utility is so fully understood, that the determination of the judges in *Taltarum's* case, so far from being considered as an unwarrantable stretch of their authority, must on the contrary be

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Law of Forfeiture, 83.

1 Bla.R. 254.

1 Burr. 115-

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(a) Lord Chief Justice Willes, in delivering the opinion of all the judges, in the case of *Martin, v. Strachan*, said, "We think common recoveries are  
 " common assurances with the consent of the parties,  
 " and are not to be compared to a judgment or proceeding in any other real action: 1st, Because now,  
 " by long custom and usage, they are become common assurances; 2d, because they are suffered by  
 " the consent of the parties, and a remainder can be  
 " barred upon no other principle but this, that a common recovery is a common assurance. Mr. Pigot,  
 " who was as able a conveyancer as any man of the  
 " profession, has confounded himself, and every body  
 " else who reads his book, by endeavouring to give  
 " reasons for, and explain common recoveries. I only  
 " say this to shew, that when men attempt to give reasons for common recoveries, they run into absurdities, and the whole of what they say is unintelligible  
 " jargon, and learned nonsense. 1 *Wilson R.* 73.  
 " Vide 1 *Burr.* 115.

acknowledged

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acknowledged to have been a measure of great public utility, and from which this country has derived infinite advantage.

*A Recovery is  
a good Bar to  
an Estate  
Tail.*

10 Rep. 37.  
b.

185. But whatever were the reasons on which the validity of common recoveries was originally founded, it may now be laid down as a certain maxim, or rule of law, which has prevailed for many centuries, that a common recovery is a common assurance, whereby all tenants in tail are enabled, by pursuing the proper form of this assurance, to bar their estates tail: And in *Mary Portington's case*, 11 Jac. 1. it was determined by all the judges, that judgment given against tenant in tail with voucher, and recompence in value, would bind the estate tail, notwithstanding the statute *de donis conditionalibus*, whether the recovery was upon good title, or not; and that the judgment given in such a case, for the tenant in tail to have in value, would bind the estate tail, although no recompence was had (a).

186. A com-

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(a) The following passage shews how strongly the judges have always supported common recoveries.  
“ At the Parliament held in the reign of the late  
“ Queen

## Recoveries.

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186. A common recovery is a good bar to the issue in tail, although the tenant in tail dies before the recovery is executed.

Thus where a tenant in tail suffered a common recovery, and died on the same day, before the court had awarded a writ of *habere facias seisinam*; and it being doubted whether execution might be sued against the issue in tail, the majority of all the judges were of opinion, that execution might be sued against the issue in tail; for the right of the estate tail was bound by the judgment given against the tenant in

Shelly's  
Case, 1 Rep.  
93. 1 Init.  
361. b. Dyer  
35. pl. 28.

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“ Queen Elizabeth, in the great case between *J. Vernon* and Sir Edward Herbert, which was argued by learned counsel before the Lords in Parliament; there Hoord, an utter barrister of counsel, with *Vernon* (who was barred by a common recovery) rashly and with great ill-will, inveighed against common recoveries, not knowing the reason and foundation of them; who was with great gravity and some sharpness reproved by Sir James Dyer, then Chief Justice of the Common Pleas, who said, he was not worthy to be of the profession of the law, who durst speak against common recoveries, which were the sinews of assurances of inheritances, and founded upon great reason and authority.” 10 Rep. 40. a.

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tail,



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1 Inst. 361. b.

tail, and the judgment over to recover in value, because common recoveries were common assurances of land. But if a recovery be against tenant in tail upon a false title, who dies before execution, in a *scire facias* against the issue in tail, he may avoid it.

1 Rep. 135.  
b. 136. a.  
Litt. f. 649.

187. If a tenant in tail is disseised, and releases to the disseisor, the estate tail is in abeyance : yet the tenant in tail may suffer a common recovery, which will bar the estate tail, the remainders, and reversion.

Herbert v.  
Binion,  
Roll. Rep.  
223.  
Poph. 100.

188. If a tenant in tail levies a fine with proclamations, and afterwards suffers a common recovery, although the estate tail was destroyed by the fine, yet still the recovery will bar the remainders and reversion depending on the estate tail.

2 Roll. Abr.  
394.

The reason usually given for this determination is, that when the tenant in tail is vouched, and comes in upon the voucher, he comes in of all the estates which were ever in him ; and as the estate tail was once in him, it is therefore barred, *Roll*, in his abridgement of this case, says, the reason of the determination is, because a common recovery is a common assurance.

It

It has also been said, that the tenant in tail, after levying a fine with proclamations, has still a *scintilla juris* in him, which enables him to bar the remainders.

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2. Atk. 201.

189. In case a tenant in tail levies a fine, and then dies, leaving issue, it seems to be a doubtful point, whether such issue, by being vouched in a common recovery, can bar the remainders and reversion depending on the estate tail. No case of this kind has, I believe, ever been judicially determined; but it is highly probable, that if a case of this nature arose, the judges would determine, that the remainders depending on such an estate might be barred by a common recovery, in which the issue in tail was vouched; for otherwise such remainders and reversion must continue to subsist as a future estate or interest, to take effect in possession upon the remote event of a general failure of issue of the tenant in tail, incapable of being barred or destroyed by any means whatsoever. This would be a perpetuity to a greater degree than what is allowed by our law, or should be permitted in any commercial country.

2 Atk. 201.

*See post.*  
206. 216.

Q 2

It

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It may also be observed, that if a tenant in tail after levying a fine has still in him a *scintilla juris* sufficient to enable him to suffer a common recovery, that *scintilla juris* descends on his death to the issue in tail, and therefore they are as well enabled to suffer a common recovery, as their ancestor was.

Roll's Abr.  
394.  
Godb. 218.  
1 Keb. 30.  
398.

190. It has been determined, that if a tenant in tail be attainted of treason, and afterwards suffers a common recovery, it will not destroy the remainder or reversion, because a person attainted is not capable of taking any thing but for the benefit of the king, and consequently the recompence in value must go to the king; so that the person in remainder can have no benefit from it, and therefore is not barred: besides, recoveries being common assurances, the recovery of a person attainted must be void in the same manner as any other conveyance of his would have been.

P. 73.

Mr. Pigot, however, seems to think, that there is such a *scintilla juris* in the tenant in tail, after an attainder; that by a common recovery he may bar his issue, the remainders and reversion; for if the king should  
pardon



pardon the party, and restore the land, he might bar the entail, although the attainder remained in force.

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191. An erroneous recovery suffered by a tenant in tail will bar his issue as long as it continues in force.

1 Inst. 349.b.  
3 Rep. 3. a.  
10 Rep. 38. a.

192. If a tenant in tail covenants to stand seised to the use of himself for life, with remainder to his son in tail, and afterwards suffers a common recovery, with single voucher, to other uses in fee, the recovery is good; for where a tenant in tail covenants to stand seised to the use of himself for life, remainder to his issue in tail, it is absolutely void, and does not alter the estate.

Machill v.  
Clerk. Com.  
Rep. 119.  
Salkeld, 619.  
Rep. temp.  
Holt, 615.  
Cro. Eliz.  
471.

193. By the statute 14 Eliz. c. 8. which has been stated in a former chapter, all recoveries suffered by tenants for life are declared void; but there is a proviso in that act, declaring that it shall not extend to recoveries where the *præcipe* is brought against the tenant for life, and the person next in remainder in tail is vouched; for in such case the recovery is good.

Ante f. 130.

Q 3

Thus,

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Jenning's  
Case.

10 Rep. 43.

Thus, where *A.* being tenant for life, with remainder to her son in tail, a *præcipe* was brought against *A.* who vouched the son, who vouched over the common vouchee, by which means a common recovery was suffered. All the judges were of opinion, that the recovery was good, and not within the statute of 14 *Eliz. c. 8.* and that the estate tail, and the remainders and reversion, were well barred.

194. If a *præcipe* is brought against a tenant in tail and his wife, where the husband is sole seised and the wife has nothing, and they both vouch over in the usual manner, it will bar the estate tail.

Eare v.  
Snow.Plowd. 514.  
18 Vin. Ab.  
214.

Thus where *John Trevilian*, being tenant in tail, suffered a common recovery, in which he and his wife vouched over the common vouchee. It was objected, that the recovery was not effectual to bar the estate tail, because the wife was named in the *præcipe* as joint tenant with her husband, and appeared and vouched as joint tenant; and the vouchee entered into the warranty, admitting that he ought to warrant to them, whereby he also admitted that the wife had an estate in the tenancy, and had  
cause

cause to vouch; and as she ought to have the recompence in value by conclusion, there was therefore no reason why the issue in tail should be barred; for the reason that an estate tail is allowed to be barred by a common recovery is, on account of the recompence in value, which is, or by possibility may be rendered; and if the wife was entitled to the recompence in value, and not the issue in tail, then there was no reason why the issue should be barred. But the judges were unanimously of opinion, that in this case the estate tail was barred, for it was expressly found by the verdict, that the wife had nothing in the tenements at the time of the recovery, but that the husband was sole seised in tail; and as he alone lost the tenancy, the recompence should go to him, and should be of the like estate with that he had lost.

195. If a *præcipe* be brought against a tenant for life and the remainder man jointly, and they vouch over, such a recovery has been determined to be no bar to the estate tail.

Q 4

Thus



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Leech v.  
Cole,  
Cro. El. 670.  
2 Roll's Abr.  
495.  
3 Rep. 6. b.

Thus where a person was tenant for life, with remainder to his eldest son in tail, and a *præcipe* was brought against the father and son jointly, who vouched over the common vouchee. It was held by three judges against one, that the estate tail of the son was not baraed by the recovery; for the lands recovered in value must go in the same manner in which the estate that was lost would have gone; whereas, in the present case, there being a joint *præcipe* brought against the tenant for life and the person in remainder, they must be supposed to be joint tenants, and the judgment must be accordingly; that as the reason why a recovery bars an estate tail is on account of the recovery in value, and as it cannot be averred that the lands recovered in value shall go in any other manner than that which is stated in the record, it follows, that the issue in tail can have no recompence.

P. 37.

Mr. *Pigot* observes, that these reasons favour of a wonderful subtilty; and that although no man would venture to suffer a recovery in this manner, yet that if a question of this kind was now agitated, these distinctions would not be so easily admitted

of, since the courts of law adopt every mode of supporting common recoveries, as assurances commonly used for the conveyance of estates. And in the case of *Page* and *Hayward*, the judges seem to have been of opinion, that a recovery of this kind would bar an estate tail.

2 Salk. 570.

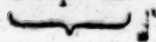
196. In that case a tenant in tail and the person in remainder joined in making a tenant to the *præcipe*, who vouched them jointly, and they in the same manner vouched over the common vouchee.

Page v. Hayward.  
Pigot 176.  
2 Salk. 570.  
Rep. temp.  
Holt, 618.

It was objected, that as the voucher was joint, the recovery in value must be joint, and so the tenant in tail and the person in remainder must recover moieties in value; whereas the whole was recovered against the tenant in tail, and consequently, to bind the issue, he ought to recover in value the whole; so that the recovery in value not being proportionable to the loss, it was void.

Lord Chief Justice *Holt* delivered the opinion of the court. As to the validity of the recovery in barring the estate tail, he observed, that if a *præcipe* was brought against

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against a tenant in tail in possession and a stranger in an adversary action, and a recovery was had, it would be good: for when a *præcipe* was brought against several persons, it was not necessary that they all should be tenants of the freehold, for if any one of them had the freehold, it would be sufficient. And if the bringing a *præcipe* against tenant in tail and a stranger would not vitiate a recovery, neither would a joint voucher; for when the vouchee comes in and enters into the warranty, he is as much tenant in law to the writ, as if the *præcipe* had been originally brought against him; and so the case of a stranger being vouched jointly with the person who is seised of the estate did not differ from the case of a stranger being made tenant to the writ jointly with the person who had the freehold. If a tenant in tail conveyed the freehold to a third person against whom a *præcipe* was brought, and he vouched a stranger who vouched the tenant in tail, and the tenant in tail entered into the warranty, and vouched over the common vouchee, this would be a good recovery; for in an adversary action, if the tenant to the *præcipe* vouched a stranger who never had any estate in the land, there was no remedy for it;



it; the demandant could not counterplead the voucher, until the statute of *Westminst.* 1. c. 40. which was productive of great inconvenience, for when a *præcipe* was brought against the tenant of the land, he might vouch a stranger, and that stranger might vouch another stranger, and so on *in infinitum*; and therefore the statute gave the counter-plea, that neither the vouchee, nor any of his ancestors were ever seised of the lands in question, by which they might have enfeoffed the tenant or his ancestors; but with this exception, unless the warrantor were present, and would *gratis* enter into the warranty. If a stranger be a good vouchee, he becomes a good tenant to the writ, and a release to him by the demandant after he has entered into the warranty is good, and the vouchee may plead it after the last continuance, for it is as valid as if it had been made to the tenant himself. Nor is it material whether there was any real warranty between the tenant and the vouchee when it is once admitted upon record, for it is then the same as if there really had been a warranty. The principal difficulty in the case was, because the recovery in value was not proportionable to the loss, for by the joint voucher the recovery in

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Ante f. 194.

in value must be joint, whereas the vouchees were tenants in tail of the whole, the one in possession, the other in remainder, and this would be a great objection, if the case were considered upon the foot of the estoppel, for the tenant in tail will be estopped during his life from claiming more than a moiety of the recompense in value, but after his death the issue in tail will not be estopped, but may say that the tenant in tail in remainder had no estate in possession in the land, so the recompense in value will go to him only. And there is no difference between this case and that of *Eare v. Snow*, in *Plowden* 514. where the husband was tenant in tail of lands, and a *præcipe* being brought against him and his wife, they vouched over the common vouchee, and the recovery was held to be good, though it was objected that the recompense in value, which was the cause of the bar, should, if the wife survived, go to her, and therefore the issue in tail was not barred. But it was held, that the issue in tail should not be bound by any estoppel which his father admitted, by joining in the voucher with his wife, but might say that his father was sole tenant in tail, and the wife had lost nothing, and he being the person who had lost the

the

the whole, should have the whole recompence.

There was a case in *Trin.* 1657, *Rot.* 179, or 180, between *Murrell* and *Osborn* (of which his Lordship said he had a report in the hand-writing of Lord Chief Justice *Bridgman*) where, in a formedon the tenant in tail pleaded in bar a common recovery on a *præcipe* against the grantee of tenant in tail, in which the tenant in tail and a stranger were jointly vouched, and vouched over the common vouchee, and it was resolved that the recovery was good. And there was also a case 23 *Hen.* 8. *Brooke's Ab. tit. Recoverie in Value* 27. where a woman was tenant in tail, and a *præcipe* being brought against her and her husband, they vouched over the common vouchee, and the recovery was held good, though the husband survived, because the recompence went in the same manner as the land recovered would have gone. This case was full in point, for the husband was as much a stranger to the wife's estate tail as any other person; and so in *Eare* and *Snow* was the wife to the husband; the only difference being, that in the case in *Brooke* the husband must have been named, whereas



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whereas in that of *Eare* and *Snow* the wife need not. His lordship concluded with citing the case in 1 *Inst.* 376. *a.* and *b.* where it is laid down, that if the heir at Common Law, and the heir in *Borough English* are jointly vouched, and vouch over the common vouchee, the heir in *Borough English* will have the whole recompence in value, because it is he who sustains the loss, and so of heirs in Gavelkind.—Judgment was given that the recovery barred the estate tail.

197. Where two persons are seised as joint tenants for life, with a remainder in tail to one of them, the person who has the remainder in tail may suffer a common recovery, which will bar his moiety of the estate for life, and also a moiety of his estate tail, for a recovery severs the jointure.

Marquis of  
Winchester's  
Case.  
3 Rep. 1.

Thus, where a gift was made to *Lionel Morris* and *Ann Miles*, of the manor of *M.* to hold to the said *Lionel* and *Ann*, and to the heirs of the body of the said *Lionel*, remainder over. A writ of entry was brought against the said *Lionel*, who vouched over the common vouchee, and judgment was

was given, and execution had according to the usual form of common recoveries.

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It was unanimously resolved, that although *Ann Miles* was jointly seised with the said *Lionel* for her life, so that as well *Lionel* as the vouchee might have abated the writ, yet when the vouchee, without demand of any lien, entered generally into the warranty, and thereby admitted the writ good, and *Lionel* recovered in value against the vouchee, who entered, according to the estate of the person who vouched; therefore, as to one moiety, the recovery was a good bar to the estate tail, and to the remainder over, because the jointure was severed; but as to the other moiety, whereof *Ann Miles* was tenant for life, the recovery was no bar either to the estate tail, which *Lionel* had expectant on the state for life of *Ann Miles*, or to the remainder, because for this moiety *Lionel* was not tenant to the *præcipe*.

198. Husband and wife being considered in law as one person, if an estate be limited to them and the heirs of their bodies, or to them and their heirs, they do not take by moieties, but are seised of one entire estate, and

Litt. f. 291.  
1 Inst. 187.b.

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and the husband alone takes nothing; not the whole estate, because the wife has a joint estate with him in possession; nor an undivided moiety of the estate, because there are no moieties between husband and wife; so that if the husband alone suffers a recovery of an estate of this kind, it will be no bar, either to a moiety or to the whole.

Owen v.  
Morgan,  
3 Rep. 5. a.

Thus, where lands were rendered by fine to husband and wife for life, and to the heirs of the body of the husband. A *præcipe* was brought against the husband, who suffered a common recovery, with voucher over of the common vouchee, the wife being then alive.

It was resolved, that this recovery, suffered by the husband only, should not bind the remainders, because there are no moieties between husband and wife, and the husband had no power to sever the joint tenancy, or to dispose of the land, during the life of the wife, he not being seised by force of the intail; and although the husband survived the wife, yet that was not material, because the law considered the case as it was at the time of the recovery.

199. So,



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Clithero v.  
Franklin,  
2 Salk. 568.

199. So, where it was found, that the grandfather covenanted to stand seised to the use of himself and his wife for their lives, with remainder to the heirs-male of the said grandfather, on the body of the said wife begotten, remainder over; the grandfather suffered a common recovery and died, his wife having survived him. To support this recovery it was contended, that the case of *Owen v. Morgan*, was not law; for if baron and feme had an intirety, then each had the whole, and therefore the baron might make a good tenant to the *præcipe* for the whole. *Pemberton contra*, that case was never questioned; the wife's estate hinders the intail from executing in the baron; so that it is only a kind of contingent estate after the death of the wife; and the estate tail cannot be tacked to the estate for life of the husband, during the life of the wife, because, during her life there is an intervening estate; it was therefore adjudged, that the recovery was void.

200. It should be observed, that although where an estate is given to husband and wife, they do not take by moieties, yet if an estate be given to a man and a woman

1 Inst. 137. a.

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for life, in tail, or in fee, they then take by moieties. And even if they should afterwards marry, they will continue to hold by moieties after their marriage.

201. We have seen that a common recovery may be suffered of a rent-charge issuing out of lands, and if such a rent be granted in tail, with a remainder over, a recovery suffered by the tenant in tail will bar it.

Smith v.  
Farnaby,  
Carter 52.  
Sid. 285.  
Weeks v.  
Peach.  
Lut. 1224.

Thus, where a person devised a rent of 50*l. per annum*, to be issuing out of lands to his son and his heirs; and if the said son should die without heirs-male of his body, then he devised it over; the son suffered a recovery of this rent, and died without issue male.

Lord Chief Justice *Bridgman*, and all the other judges were of opinion, that the recovery was good, and the remainder well barred; and this judgment was affirmed in the court of King's Bench.

Chaplin v.  
Chaplin,  
3 P. Wms.  
229.

202. A distinction has however been adopted between a grant of a rent-charge in tail, with a remainder over of the same  
rent-

rent-charge in fee, and a grant of a rent charge in tail, without any subsequent limitation of it in fee. In the first case the tenant in tail acquires an estate in fee simple in the rent-charge by means of the common recovery, but in the second he only acquires a base fee, determinable on his decease and failure of the issue.

The principles upon which this distinction is founded, are thus fully explained by Mr. *Butler* in one of his notes to the first Institute,—“ The reason of this difference “ is, that it would be unjust that the conveyance of a grantee of a rent, should “ give a longer duration or existence to the “ rent, than it had in its original creation. “ It is true, that the barring of an estate “ tail in land, is equally contrary to the intention of the grantor. But a rent differs materially from land. The old “ principles of the Feudal Law looked “ upon every modification of landed property, which was considered to be against “ common right, with a very jealous eye. “ Now, a rent-charge was supposed to be “ against common right, the grantee of the “ rent-charge being subject to no feudal “ services, and being a burthen upon the “ tenant who was to perform them. Up-

1 Inst. 298.

2. n. 2.



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“ on this principle the law, in every  
 “ instance, avoided giving by implication  
 “ a continuation to the rent, beyond the  
 “ period expressly fixed for its continuance.  
 “ Thus, if a tenant in tail of land die with-  
 “ out issue, his wife is entitled to dower  
 “ for her life out of the land, notwithstanding  
 “ the failure of the issue; but the wi-  
 “ dow of a tenant in tail of rent is not  
 “ entitled to her dower against the donor.  
 “ So if a rent is granted to a man and his  
 “ heirs generally, and he dies without an  
 “ heir, the rent does not escheat, but sinks  
 “ into the land. It is upon this principle,  
 “ that when there is not a limitation over in  
 “ fee, a tenant in tail of rent acquires, by  
 “ his recovery, no more than a base fee.  
 “ But if there is a limitation in fee, after  
 “ the particular limitation in tail, the  
 “ grantor has substantially limited the rent  
 “ in fee; and therefore, it is doing him no  
 “ injustice that the recovery should give  
 “ the donee, who suffers it, an estate in fee  
 “ simple.”

*Of Recove-  
 ries, with  
 single and  
 double  
 Voucher.*

203. A common recovery may be suf-  
 fered with a single, double, or treble  
 voucher; and if a recovery is suffered  
 without any vouchee, as if judgment is  
 given

given upon default, confession, or *nient dedire* of the tenant, it does not bind the issue in tail, because they have no recompence, and are not estopped by their father's judgment, as they claim paramount the estoppel *per formam doni*, and therefore they may falsify such recovery.

204. A recovery, with single voucher, that is, where the *præcipe* is brought against the tenant in tail himself, who immediately vouches over the common vouchee, is a good bar to the estate, whereof the tenant in tail is in possession at the time of the recovery; but is no bar to any other estate.

A recovery, with double voucher, that is, where the tenant in tail is vouchee and vouches over the common vouchee, is a good bar, not only to the estate whereof he is then in possession, but also to all other estates to which he has any right, although such estates be devested out of him and discontinued.

Vide Moor  
25. p. 402.  
Bro. Recov.  
19. 30.

A recovery, with treble voucher is used to make a perpetual bar of the estate whereof the tenant to the *præcipe* was seised, and

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also of every estate of inheritance which has ever been in the first or second vouchee, or their ancestors; and also of all remainders and reversions depending on those estates, and all charges and incumbrances derived out of those remainders and reversions.

Pigot 109.

205. The reason of the difference between a recovery with single, and a recovery with double voucher, is, that in a recovery with single voucher, where the *præcipe* is brought against the tenant in tail, who vouches over the common vouchee, if the tenant is not seised of the estate tail at the time, the issue in tail may, after the death of the ancestor, plead, *nient tenant tempore brevis nec unquam postea*, and by that means avoid the recovery; for the tenant in tail not being seised of the estate tail at the time of the recovery, the recompence in value can only go in lieu of the estate whereof he was then seised, and not in lieu of the estate tail; so that, as to the issue in tail, it only operates as a recovery on a false title which never bound them, because they could have no recompence in value. But where the tenant in tail comes in upon the voucher of the te-



nant to the *præcipe*, without demanding the lien, or counterpleading the warranty, he then comes in, in privity of all the estates he ever had, though the precedent estate, on which the voucher depends, is divested, discontinued, and turned to a right, and the recompence in value, which he has, or possibly may have, bars the issue.

Pigot 114.  
3 Rep. 60.  
Moor 634.  
Owen 130.

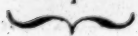
206. If a tenant in tail be disseised, or discontinues the estate tail, by fine or feoffment, and takes back an estate to himself, in fee or in tail, and then suffers a common recovery with single voucher, it will not bar the estate tail.

Thus, in *Taltarum's* case it was resolved, that the issue in tail was not barred by the recovery of his ancestor, because the recovery was only with single voucher, and the tenant in tail was not actually seised of the estate tail at the time of the recovery. Antef. 181.

207. So, if there be tenant for life, remainder in tail to another person, and a stranger disseises the tenant for life, and then enfeoffs the person in remainder, against whom a *præcipe* is brought, and he suffers a common recovery, this will not

Lincoln College Case,  
3 Rep. 58.  
18 Vin. Abr.  
197.

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bind the remainder in tail, because the tenant in tail was not seised thereof at the time when the recovery was suffered, but had only a right thereto, and so the recompence in value could not extend to it.

Peck v.  
Channel,  
Cro. Eliz.  
827.

208. Where a woman, who was tenant for life, married the remainder-man in tail, and they joined in levying a fine, *sur done, grant & render*, whereby the lands were rendered to the woman for life, with remainder to the husband and his heirs; afterwards, the husband and wife suffered a common recovery, with single voucher, to the use of the husband and his heirs.

It was resolved that this recovery was no bar, because the person who suffered the common recovery was not seised of the estate tail at the time, but of an estate in fee, which he had taken back by the fine; so that the recompence in value went to the new estate in fee, and not to the old estate tail.

Freshwater v.  
Rois,  
Yelv 51.  
18 Vin. Ab.  
197.

209. In the same manner, where tenant in tail, with remainder over, covenanted to stand seised to the use of himself and his heirs, until the marriage of his son, then to the use of himself for life, remainder to the use

use of his son and the heirs of his body, then suffered a common recovery with single voucher, and died without issue.

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It was adjudged that the recovery did not bar the remainder, expectant on the estate tail, because the covenant to stand seised had changed the estate tail into an estate in fee; so that the person who suffered the recovery was not seised of the estate tail at the time.

210. Where a person is tenant for life, with an intervening estate of freehold to trustees for preserving contingent remainders to his sons and daughters, and an unexecuted remainder in tail to himself: a recovery with single voucher will not bar the remainders over.

Fearn 42.  
Powell v.  
Price.  
2 P. Wms.  
536.

Thus, where *Charles Meredyth* being seised in fee of the lands in question, and having one son, *Henry*, by a former wife, previous to his marriage with his second wife, *Judith Savage*, by articles in consideration of the then intended marriage, which soon after took effect, and of 1000 l. marriage portion, and of his natural affection for his son, *Henry*, covenanted to stand seised

Meredyth.  
v Leslie,  
6 Brown 209.



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seised of the said premises, to the use of himself for life, and after his decease to the use of *Judith* for her life, and after her decease to the use of his son, *Henry*, for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of *Henry* in tail male, remainder to his daughter in tail, *remainder to the heirs of the body of Henry*, remainder over.

By indenture *tripartite*, between the said *Charles Meredyth*, and *Henry Meredyth*, his eldest son, and heir apparent, of the first part; *Philip Savage*, and *Henry Luther*, of the second part, and *H. Wybrants*, of the third part. It was witnessed, that in performance of the said articles they the said *Charles* and *Henry* covenanted, that *Charles* and *Judith*, his wife, and *Henry*, would, before the end of *Michaelmas* term then next, levy a fine, and suffer a recovery of the lands comprized in the said articles, to the use of *Charles Meredyth* for life, and after his decease, then as to a certain part of the said lands to *Judith Meredyth* for life, for her jointure, remainder, after the death of *Charles* and *Judith*, to *Henry* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other  
sons

sons of *Henry* in tail male, remainder to his daughters in tail, *remainder to the heirs of the body of Henry*, remainder over.

After the death of *Charles Meredyth*, his son *Henry* entered upon the lands comprized in the articles and settlement, and suffered a recovery with single voucher, the writ of entry being brought against himself as tenant of the freehold who vouched over the common vouchee.

One of the questions in this case was, Whether this recovery suffered by *Henry* barred the estate tail of *Henry*, and the remainders over? The House of Lords directed the judges to deliver their opinion upon the following question:—"A tenant  
 " for life, remainder to trustees to preserve  
 " contingent remainders, remainder to his  
 " first and every other son in tail male, remainder to his daughters in tail general,  
 " remainder to the heirs of his body, with  
 " remainders over. *A.* suffers a recovery  
 " with single voucher, being himself tenant  
 " to the writ. Whether this recovery is  
 " good to bar the remainders expectant  
 " upon the estate tail of *A.*?" Whereupon the Lord Chief Justice of the court of  
 Common

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Common Pleas having conferred with the judges present, delivered their unanimous opinion, That the recovery with single voucher did not bar the remainders over. And the House of Lords decreed accordingly.

In the preceding cases, if the recoveries have been suffered with double voucher, they would have been a good bar; because, as the tenant in tail would then have come in upon the voucher, he would have been barred of all the estates and interests which were ever in him.

Ante f. 198.

211. We have before seen, that where an estate is given to husband and wife as joint tenants, with a remainder to the husband in tail, a recovery suffered by the husband alone, will not bar his remainder in tail, because there being no moieties between husband and wife, the husband is not seised of the estate tail during the life of his wife.

212. But if, in a case of this kind, the husband suffers a recovery with double voucher, it will be a good bar of the husband's estate tail, because when he comes  
in



in as a vouchee, he comes in of all the estates which are in him.

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Thus, where *A.* and his wife were seised of the manor of *B.* to them and the heirs male of the body of the said *A.*

Cuppledike's  
Case.  
3 Rep. 5.

The husband levied a fine, and a writ of entry was brought against the cognizee of the fine, who vouched the husband, and he vouched over the common vouchee, and judgment was given in the usual manner.

The question was, Whether the remainder was well barred by this recovery, the wife not being vouched? And it was resolved, that the recovery should bar the remainder; for although the husband alone was vouched, and not his wife, who had a joint estate with him, yet the husband coming in as vouchee, the recovery barred all the estates which were ever in him.

213. So where *A.* was seised of a manor to him and his wife, and to the heirs male of the body of the husband. *A.* bargained and sold the manor to a stranger, who suffered a common recovery, in which *A.* was vouched, who vouched over the common vouchee.

Fitzwilliam's  
Case.  
6 Rep. 32.

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vouchee: It was adjudged, that although *A.* alone was vouched, and not his wife, yet that the estate tail was barred, for the reasons given in the last case.

Hallet v.

Saunders.

2 Lev. 107.

2 Bac. Ab.

546.

214. In the same manner, where *A.* who was seised in fee of the lands in question, upon the marriage of his son *D.* covenanted to stand seised, to the use of himself for life, remainder to the said *D.* and his wife, and the heirs male of their bodies, remainder to *D.* and the heirs male of his body, with several remainders over. *A.* died, and *D.* suffered a common recovery with double voucher, in which he alone was vouched, and vouched over the common vouchee: the wife died, and afterwards *D.* died without issue.

It was agreed, 1st. That this settlement being made before marriage, when the husband and wife took by moieties, and not by intireties, the husband had an absolute power over his own moiety, and therefore, as to the husband's moiety, the recovery was a good bar; in which this case differs from that of *Owen v. Morgan*, where the settlement being made after the marriage, the husband and wife took by intireties:  
2dly.

2dly. That this recovery was no bar to the moiety of the wife, because she was not vouched. 3dly. That the estate tail, which was limited to *D.* and his wife and the heirs male of their bodies, being determined, the remainder to *D.* in tail male general, and all the other remainders depending thereon, were absolutely barred by the recovery; for when *D.* was vouched, and vouched over; he came in of all the estates he had, and consequently the remainder in tail male to himself, and all the remainders depending on it, were well barred.

215. *Edward Moody* tenant in tail under his father's will, with a contingent remainder in fee to himself, being about to marry, in 1709 conveyed, by way of immediate use, to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to himself and his wife in fee; *Edward Moody* afterwards made his will and devised part of his estate, of which he had suffered a recovery, to his younger son, after the death of his wife. The wife died, and the eldest son set up a title to the estate. The bill was brought by the younger son.

*Moody v.*  
*Moody,*  
*Amb. R. 649.*



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Ante f. 2.  
214.

It was argued for the plaintiff, that the conveyance being before marriage, the husband and wife were intitled in moieties, and in that respect differed from the case of a conveyance to husband and wife after the marriage; and that the recovery in which only the husband was vouched barred a moiety of the estate. This was said to be doubted in *Cuppledike's* case, but was settled in *Hallet and Saunders*.—It was argued for the defendant 1st, that there being a covenant in the settlement to do all further acts by fine, recovery, &c. The recovery suffered by *Edward Moody* was to be considered as an act done, not in destruction but in confirmation of the settlement. 2d, That the husband and wife were seised of an entire estate which, according to Lord *Coke*, is inseperable, and therefore the recovery in which the husband alone was vouched, was void *in toto*.

In reply it was said as to the first question, that *Edward Moody* being seised of two estates tail, the recovery barred both, and as to the second, the distinction was relied on between a joint estate given to the husband and wife before marriage, and a joint estate given to them after marriage; the

the former is severable, the latter not.— Lord *Camden*, Chancellor, after taking time from the 24th *January* to the 30th *May*, for consideration, gave his opinion. First, That the recovery was a confirmation of the settlement and not a destruction of it, being to be considered as a bar of the old entail only. This was a slight question and deserved little notice, where tenant in tail is vouched, he comes in of every estate he has; if it had been his intention only to have barred the old entail, he would have declared so.

2d. Question, which is the only one that deserves serious consideration, is as to the operation of the recovery. In general a fine or recovery by one joint-tenant only severs the joint-tenancy, and operates on a moiety. *Co. Lit.* 187, makes the distinction between a joint estate given to the husband and wife during the marriage, and a joint-estate to them before marriage. In the former case their interest is not severable, in the latter case they take in moieties.

The doubt in *Cuppledike's* case arose on a joint estate during marriage; and *1 Leon*, 270, is mistaken as to Lord *Coke's* doubt,  
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for the case of a joint estate before marriage is not mentioned in *Cuppledike's* case.

The question seems to have been determined in *Simmond's* case, *Moore*, 92, the only doubt is, whether the husband and wife can hold moities, and in that case all the judges held, there were several estates tail between husband and wife. It follows that the recovery in this case is a severance of the joint estate, and passes a moiety.

Ante f. 189.

216. We have seen that where a tenant in tail levies a fine and dies, leaving issue, it is a doubtful point whether such issue, by being vouched in a common recovery, could bar the remainders, &c. depending on such estate tail. But if it is admitted, that where a person is vouched, and vouches over, he comes in of all the estates and rights which are in him, it will follow that in a case of this kind the remainders may be barred by a common recovery, in which the issue of tenant in tail comes in upon the voucher.

*Effect of Recoveries in barring Remainders and Reversions.*

217. A common recovery duly suffered is not only a good bar to an estate tail, but is



is also a bar to all remainders and reversions depending on the estate tail, of which a common recovery is suffered, and to all charges and incumbrances created by the persons in remainder and reversion.

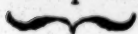
Thus, where *William Capel*, being tenant in tail, remainder in tail to *Richard Capel*, *Richard Capel* granted a rent-charge of 50*l.* per annum to his son; afterwards *William Capel* levied a fine of his estate tail to two persons, against whom a *præcipe* was brought, who vouched *William Capel*, and he vouched over the common vouchee, by which means a recovery was suffered of the lands.

Capel's Case,  
1 Rep. 62.

*William Capel* died without issue, and the question was, Whether this rent-charge, granted by the remainder-man, was barred by the recovery?

It was resolved by all the judges, in the Exchequer Chamber, That this rent-charge was well barred, and that a common recovery, duly suffered by a tenant in tail, should not only bind the remainder, and all leases, charges and incumbrances, granted or made by the person in remainder,

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mainder, but also the reversion, and all leases, charges, and incumbrances, granted or made by the person in reversion; and that there was no difference between a reversion and a remainder, expectant upon an estate tail, in that respect.

Cholmley's  
Case,  
2 Rep. 52.

218. So where *A.* was tenant in tail, remainder to *B.* in fee. *B.* granted his remainder to a stranger for life, with remainder to the queen in fee, upon condition. *A.* the tenant in tail, suffered a common recovery; and the question was, Whether the recovery barred the estate for life, and the remainder upon condition to the queen?

It was resolved, that the recovery not only barred the estate tail of *A.* but also the estate for life in remainder, and that the remainder in fee limited to the queen was void.

Hudson v.  
Benson and  
Baron,  
2 Lev. 28.  
Sir T. Ray.  
236.

219. *Rowland Morley* being seised in fee made a feoffment to the use of himself, and the heirs male of his body, remainder in tail to several other persons, with a proviso, that if *Rowland* and *Edward* his son, and Lady *Elizabeth Morley* should happen to die,

die, and there should be no issue male of *Rowland*, that then *Ann Morley* should have a rent-charge out of those lands of 200*l.* a year, until she received the sum of 2000*l.*

*Edward Morley*, the last issue male of *Rowland Morley*, made a lease for 1000 years, and afterwards levied a fine and suffered a recovery, and died without issue. The question was, Whether the rent-charge of 200*l.* a year, limited to *Ann Morley*, was barred by this recovery?

It was argued, that the rent-charge was only a contingent use, which was not *in esse* when the recovery was suffered: so that the recompence in value could never extend to it, and therefore that it ought not to be barred. As to *Capel's* case, it was observed, that the rent was barred, because it issued out of the remainder in tail, which was barred by the recovery. But it was resolved, that the rent-charge was barred by the recovery, because all the estates charged with the rent were barred; and that *Capel's* case ruled the present case; for in that case all the objections were made which arose in the present case. And Sir



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*Matthew Hale* observed, that about the 9 *Eliz.* it was doubted whether, if a remainder for years were limited after an estate tail, it could be barred by a recovery suffered of the estate tail; because the lease for years being only a chattel, no recompence in value could go to it; but it was now universally allowed, that such a lease was barred by a recovery.

3 *Keb.* 488.

Thus, if lands be limited to *A.* for life, remainder to his first and other sons in tail, and, for want of such issue, to trustees for 500 years; the tenant in tail in possession may bar this remainder for years by a common recovery.

1 *Mod.* 111.

1 *Keb.* 31.

3—291.

220. A gift was made in tail, determinable on the donor's payment of 1000*l.* with a remainder over; before the day of payment, the tenant in tail suffered a common recovery, and it was adjudged, that the right of the donor to the 1000*l.* and also the remainder over, were well barred.

1 *Inst.* 223. b.

n. 1. 381. a.

n. 6 *Rep.* 41. a.

221. The power of suffering a common recovery is one of those privileges which is so inseparably annexed to an estate tail, that it cannot be restrained by any condition,

dition, limitation, proviso, or covenant  
whatsoever.

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Thus, where *C. Corbet* covenanted to stand seised of lands to the use of himself for life, remainder to the use of *R.* and the heirs male of his body, with divers remainders over. Provided that if *R.* or any of the heirs male of his body should attempt or procure any act, or thing, by which any estate tail so limited, should be undone, barred, or determined, that then the uses and estates to him limited, who should so do, &c. should cease, only in respect to such person so attempting, in the same manner as if such person so attempting, &c. were naturally dead; and that then immediately in all such cases, the uses of such lands should be to such persons for such and the like estate, and in the same manner and form, and with such remainders over, and under such limitations and restrictions, &c. as if such person so attempting, &c. were naturally dead.

Corbet's  
Case,  
1 Rep. 83.  
Mildmay's  
Case.  
6 Rep. 40.  
S. P.

Afterwards *Corbet* died, and *R.* the first tenant in tail suffered a common recovery to his own use. The person next in remainder entered: and upon the question

S 4

whether

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whether such entry was lawful or not? The court of Common Pleas unanimously agreed, that this *proviso* to cease an estate limited to one, and the heirs-male of his body, *as if the tenant in tail were dead*, was repugnant, impossible, and against law. For the death of tenant in tail, was not a cesser of the estate tail, but the death of tenant in tail, without issue of his body, was the determination thereof.

Mary Portington's  
Case,  
10 Rep. 37.

222. So where lands were devised to several daughters successively in tail, with a *proviso*, that if any of them should conclude and agree to or for the doing or execution of any act, &c. whereby the lands intailed, &c. or any estate or remainder thereof should, by any way or means, be discontinued or aliened, or should do any act or thing whereby the lands might not descend, remain, or come, as limited by the will, that then the person so concluding and agreeing to or for the doing and execution of any such act, &c. should immediately after such conclusion and agreement, &c. lose and forfeit, such estate and benefit as she and they might claim, in such manner as if she or they had never been named in the will, and thenceforth the estate and  
estates



estates limited to her or them should utterly cease, as fully to all intents and purposes as if she or they, were *dead, without heirs of their bodies.* The first tenant in tail concluded, and agreed to suffer a common recovery, and suffered one accordingly; the next in remainder claimed the estate as forfeited; and contended, that if the donor could not restrain the recovery after it was suffered, because thereby the remainder was barred, yet he might restrain the conclusion and agreement to suffer it, to prevent the bar by the recovery.

But it was adjudged in that case, that tenant in tail cannot be restrained by any condition or limitation from suffering a recovery; and that it was absurd to say that the recovery itself cannot be prohibited by any condition or limitation; and yet that the conclusion or agreement to suffer it may be prohibited; and it was also laid down in the arguments in the same case, that the levying a fine within statute 4 *Hen. 7. c. 24.* and 32 *Hen. 8. c. 36.* to bar the issue, was of the number of those incidents to an estate tail, which could not be restrained by condition.

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1 Bac. Ab.  
411.

223. But although a condition, that tenant in tail shall not suffer a common recovery, is void, yet it has been determined, that a covenant, not to suffer a common recovery, will bind the assets of the covenantor.

Collins v.  
Plummer,  
1 P. Wms.  
104.  
2 Vern. 635.

Thus, where a person, in consideration of marriage, settled lands upon himself for life, remainder to his intended wife for life, remainder to the heirs of his body on his wife to be begotten, remainder to his own right heirs, and covenanted with the trustees, that he would not suffer any recovery to bar the limitations in the settlement.

The husband suffered a recovery of these lands, to the use of himself and his heirs.

Vide 2 Vernon 233.  
251.

The Chancellor was of opinion, that the covenant did not bind the land so as to defeat the recovery. But it being pressed, that they might be at liberty to sue the executor, and recover out of the personal assets, an issue was directed to try what the wife, and the issue of the marriage were damaged by the breach of this covenant.

22 . Where

224. Where an heir in tail is disinherited by a common recovery, and seeks for relief in a court of equity, the recovery, together with the deeds for making a tenant to the *præcipe*, will be directed to be brought before a Master, that the person thus barred may have an opportunity of inspecting them, and of seeing whether any thing can be discovered for his advantage.

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Earl of Suffolk v. Howard,  
2 P. Wms.  
177.  
Bettison v. Farrington,  
3 P. Wms.  
363.



## CHAPTER XI.

## Of the Force and Effect of a Common Recovery in barring other Estates and Interests.

225. **A** Common recovery differs very much in its operation from a fine, for it has not the power of establishing an undoubted title after a certain number of years. A fine was originally adopted, as a public and solemn mode of alienation, and its effect in barring intails, arose in consequence of a positive law, made some centuries afterwards. A recovery was first generally introduced for the purpose of barring intails only, and therefore it has not in some respects so extensive and powerful an effect as a fine. But in consequence of the principle, that where a common recovery is suffered, the recoveror thereby acquires a new estate in fee simple, it has been determined that a recovery is a good bar to several other estates and interests in land, besides estates tail.

226. By the Common Law, where a husband being impleaded had given up the land demanded to his adversary *de plano*, that is by a regular judicial surrender, the justices, upon a writ of dower brought by the wife, would adjudge the wife her dower. But, where the land was lost by default, there was a difference of opinion; some justices holding that the widow was, in such a case, intitled to dower, others that she was not. To remove this ambiguity, it was declared by the statute of *Westminster 2. c. 4.* that a woman claiming her dower, should be heard in this case as in the former; and if it was objected to her, that her husband lost the land by judgment, so that she ought not to have any dower, and upon enquiry it was found to be a judgment by default; then that the tenant should further shew, what he had a right to according to the writ, which he had first brought against the husband; and if he proved the husband had no right, nor any one but himself, then that the judgment should be *quod tenens recedat quietus*, and *quod uxor nihil capiet de dote*; but if he could not shew that, then that the woman should have judgment *quod recuperet dotem suam*.

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*Dower, &c.*  
Stat. Westm.  
2. c. 4.  
2 Inst. 347.

227. It

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2 Rep. 74. a.  
10—43. a.  
Pigot 66.

227. It follows from these principles, that a common recovery suffered by a husband alone, will not bar his wife of dower, but if the wife joins in such recovery, it will be a good bar to her claim of dower out of the lands comprised in the recovery, although she can have no recompence in value, and the wife shall be supposed to have joined in such recovery, for the sole purpose of barring herself from claiming her dower.

Ante §. 194.

Thus, in the case of *Eare v. Snow*, it was agreed by all the judges, that the wife was named in the *præcipe*, in order that she might be barred of her dower, for which purpose women were usually named in recoveries, had against their husbands.

228. A woman may also bar herself of her jointure, by joining her husband in suffering a common recovery, in the same manner as if she had joined him in levying a fine, and for the same reasons.

Incedon v.  
Northcote,  
3 Atk. 430.

If a married woman having the trust of a term in her, joins her husband in suffering a common recovery of the lands out of which the term is created, she will be thereby



thereby barred of all her claim to it, for she comes in by voucher, in privy of all her estate legal and equitable.

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229. A common recovery suffered by a *cestui que trust* in tail, who is in possession under the trustees, will be sufficient to bar all remainders and reversions depending on such estate tail, although there be no legal tenant to the *præcipe*.

*Trust Estates.*

Sir *Francis North* purchased certain lands in *Essex* from *Richard Allington*, who was *cestui que trust* in tail of them, with remainders over, and had suffered a common recovery; but there was no legal tenant to the *præcipe*, the freehold being in the trustees, who were not parties to the recovery.

North v.  
Champer-  
noon,  
2 Chan. Ca.  
63. 78.  
S. C. 4 Vern.  
13.  
1 P. Wms. 91.

The question was whether the remainders expectant on the estate tail were barred by this recovery.

The decree was in these words: "his lordship, upon long debate of the matter, on hearing what was alledged by the counsel on either side, touching the same, declared that he was fully satisfied that the said recovery did sufficiently

2 Cha. Cas.  
78.

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Beverly v.  
Beverly,  
2 Vern. 131.  
S. P.

“ently bar all remainders depending upon  
“the estate tail of *Richard Allington* who  
“suffered the same; it being a general  
“rule that any legal conveyance or assur-  
“ance by a *cestui que trust*, shall have the  
“same effect and operation upon a trust,  
“as it should have had upon the estate in  
“law, in case the trustees had executed  
“their trust; otherwise trustees by refusing  
“or not being capable to execute their  
“trust, might hinder the tenant in tail  
“of that liberty, to dispose of his estate,  
“and bar the remainders, which the law  
“gives him as incident to his estate, which  
“would be manifestly inconvenient, and  
“tend to the introducing of perpetuities.”

Robinson v.  
Cumming,  
Forrest. 167.  
1 Atk. 473.

230. Recoveries of this kind only  
operate on the trust estate whereof they are  
suffered, and the equitable remainders ex-  
pectant thereon; but do not affect any  
legal estate, so that the legal remainder  
cannot be barred by any equitable re-  
covery.

Salvin v.  
Thornton,  
cited Brown's  
Cases in  
Chan. 73.  
Amb. Rep.  
545. 699.

Thus, where *John Thornton* being seised  
of the premises for life, with remainder to  
his first son, *Thomas*, in tail, remainder to  
his second son, *James*, in tail, forfeited in  
the

the rebellion in 1745. The estate for life being put up for sale by the commissioners, was brought by *Thomas* (the tenant in tail) but in the name of a trustee. *Thomas*, thus having the equitable estate for the life of his father, and the legal estate tail, suffered a recovery, and soon after died, leaving issue a daughter, wife to the plaintiff. *James*, the second son, took possession, suffered a recovery (after the death of his father and the trustee, in whom his estate vested) and died, leaving two daughters, the defendants, who were in possession. The bill was filed by *Salvin*, in right of his wife, for an account of profits, and to have the estate delivered up. Upon the hearing at the *Rolls*, his Honor ordered the bill to be retained for a year, with liberty for the plaintiff to try the validity of the recovery at law. But it was the opinion of the court, that *Thomas's* estate for life being an equitable estate, and his estate tail a legal estate, did not enable him to suffer either a perfect legal or a perfect equitable recovery, and therefore the recovery suffered operated nothing.

Shapland v.  
Smith,  
Brown's Ca.  
in Chan. 75.  
S. P.

231. In recoveries of this kind there must be an equitable tenant to the *præcipe*,  
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that is, the trust estate must be conveyed to a third person, against whom the writ must be brought, in the same manner as in recoveries of legal estates.

2 Chan. Ca.  
64.

232. If there be a *cestui que trust*, for life before the *cestui que trust* in tail, so that in case the legal estate had been conveyed according to the trusts, the tenant in tail could not bar the estate tail by a common recovery, there the *cestui que trust* in tail cannot bar his estate tail by a recovery.

233. Where an estate is conveyed or devised to trustees and their heirs, upon trust to pay debts generally, or such debts as are specified, and after payment of such debts or when such debts shall be paid, then in trust for *A. B.* or in trust to convey such parts of the estate as shall remain unsold to *A. B.* in either of those cases *A. B.* has a trust estate in the surplus vested in him immediately upon the execution of the deed, or the death of the testator, and may suffer an equitable recovery of such estate.

This point was lately investigated with great learning and ability in consequence  
of

of an objection that was made to the title of the Marquis of *Bath* upon the following case :

By a settlement previous to the marriage of Lord *Bath* (then Lord *Weymouth*) certain estates were conveyed to the use of Lord *Bath* for life, remainder to the intent that Lady *Bath* should receive a jointure, remainder for a term of years to raise portions for younger children, remainder to the first and other sons of the marriage.

Vide Collec-  
tanea Juridi-  
ca, vol. i.  
page 214.

The estates thus settled being subject to several incumbrances, other estates were limited to trustees in fee upon trust to stand seised thereof as a collateral security to protect the settled estates ; and in order to discharge the said incumbrances, it was declared that the trustees should by mortgage or sale of the estates conveyed to them raise such sums of money as should be necessary to pay off the incumbrances : and it was agreed, that after all the incumbrances should be paid and all the other trusts should be performed, the trustees should stand seised of so much of the said estates as should remain unsold, and of the

equity of redemption of so much as should have been mortgaged, upon trust to settle and convey the same to Lord *Bath* for life, remainder to his first and other sons in tail male.

No sale or mortgage was ever made by the trustees, nor were any of the incumbrances paid off until 1787, when Lord *Bath* and his eldest son joined in a recovery of the estates which had been conveyed to the trustees.

2 Atk. 578.  
1 Vezey 144.

The validity of this recovery was objected to because it was suffered before the debts were paid, and the objection was founded on a *dictum* of Lord *Hardwicke* in the case of *Bagshaw v. Spencer*, which was a devise to five persons and their heirs in trust to pay debts, and then as to one moiety to the use of *Benjamin Bagshaw* for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of *Benjamin Bagshaw*, remainder over. *Benjamin Bagshaw* suffered a recovery before the debts were paid, and a suit in Chancery being instituted to ascertain what estate *Benjamin Bagshaw* took by this devise, Lord *Hardwicke* said, that the devise



devise to *Benjamin Bagshaw* was merely a trust in equity, for as the first devise was to the trustees and their heirs, it carried the whole fee in point of law; that it could not be construed an executory devise of the legal estate, for in that case it would be too remote, being given after all debts should be paid, which might in point of time exceed a life or lives in being, or any other time allowed by law. After which his Lordship is stated to have said these words—"That the recovery suffered was before the debts were paid, and consequently *Bagshaw* could not make a good tenant to the *præcipe* to support the recovery." Upon the authority of this passage it was contended that whether the limitation to Lord *Bath* was considered as a springing or shifting use at law, or a springing executory trust, it was not barred by the recovery suffered by Lord *Bath*, because at the time of suffering the recovery, the event on which the limitation was to take effect, namely, the discharge of the debts, had not happened.

On the other side it was clearly laid down and proved by Sir *John Scott*, Mr. *Maddocks* and the late Mr. *Fearne*, that the

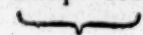
limitation to Lord *Bath* in the settlement, gave him an immediate vested interest in the surplus of the estate after payment of the debts; that in the case of *Bagshaw* and *Spencer*, both the Master of the Rolls and Lord *Hardwicke* agreed that the devise to *Benjamin Bagshaw* was an interest actually vested in him. As to the idea of its being an executory devise of the legal estate, Lord *Hardwicke* said if the will was to be construed in that manner, the devise would be too remote, being after payment of debts; but even admitting it to be a good executory devise of the legal estate to *Benjamin Bagshaw*, yet it did not vest in him, nor could his devisee claim it, *because the recovery was suffered before the debts were paid, and consequently whilst the fee was in the trustees, so that he could not make a good tenant to the præcipe.* The meaning of the expression of Lord *Hardwicke* so much relied on was therefore no more than this;—that a person to whom an executory devise of a legal estate is made cannot suffer a recovery until the event, on which the executory devise is directed to take effect, has happened.

It was admitted that there was a strict analogy between executory devises and springing executory trusts, from which it was concluded that if a devise of an estate after payment of debts was not good as an executory devise, a limitation of the same kind in a deed would be void as a future executory trust; consequently the trust created in Lord *Bath*'s settlement, to settle the estates after payment of the debts, would have been void as an executory use or trust, and the estate must have resulted to Lord *Bath* and his heirs who was the original owner of the inheritance; from whence it followed that any conveyance by Lord *Bath* would make a good equitable title, subject to the trust for payment of the debts.

It was lastly said that the payment of debts was not a condition precedent, which must be performed before a subsequent limitation or devise would take effect, but such subsequent limitation or devise is an interest commencing at the same time and concurrent with the limitation or devise for payment of debts; and the words *after payment of debts*, or *when the debts shall be paid*, only denote the order or course in



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which the several interests shall take place in point of actual possession and perception of the profits, without preventing the subsequent estates, whether legal or equitable, from becoming vested in interest, at the same same time with those which are prior to them in point of limitation.

*Powers ap-  
pendant, or in  
Gross.*

234. Where a person has a power appendant, or in gross, if he suffers a recovery of the lands, to which the power relates, it will bar and destroy it, because the lands are supposed to have been recovered by a right which is paramount to that of the person who created the power, and which therefore over-reaches it.

King v. Mel-  
ling,  
2 Lev. 58.  
1 Vent. 225.

Thus, where lands were devised to *Bernard Melling* for life, and after his death to the issue of his body by a second wife (he having at the time of the devise another wife) and for default of such issue, to *John Melling*, provided that *Bernard* might settle a jointure on his second wife,

*Bernard Melling* entered on the death of the devisor, and, during the life of his first wife, suffered a common recovery, to the use of himself an his heirs.

It

It was agreed, in the Exchequer-chamber, by all the judges, 1st. That *Bernard Melling* took an estate tail by the devise; and, 2d. That the power to make a jointure was destroyed by the recovery.

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235. A settlement was made of lands to the use of *A.* for ninety nine years, if he should so long live, remainder to trustees during the life of *A.* to preserve contingent remainders, remainder over, with a power to *A.* to charge the lands with divers sums of money.

*Saville v. Blackett*,  
1 P. Wms.  
777.

*A.* the trustees, and the remainder man in tail, joined in suffering a common recovery, and declaring new uses thereof, viz. to the use of *A.* for life, with remainder over.

It was determined, that the joining of *A.* in making the new settlement, without reserving a power to charge the premises with the said money, had destroyed that power which *A.* had of charging; for the contrary construction would enable him to defeat his own grant.

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Vide Fines.

236. Powers collateral to the land are not barred by a common recovery, for the same reason that they are not barred by a fine.

Conditions

collateral,

Ferne 310.

237. A common recovery suffered by a tenant in tail, bars all collateral conditions which are to take place on the determination of such estate tail.

Page v.

Hayward,

Pigot 176.

Thus, where *Nicholas Searle* devised lands to his niece, *Mary Bryant*, and the heirs-male of her body, upon condition, and provided she intermarried, and had issue male by a person surnamed *Searle*, and in default of both these conditions, he devised the lands to *Elizabeth* in the same manner. *Mary Bryant* married one *Cliff*, and with him levied a fine, and suffered a recovery of the lands in which she and her husband were vouched. It was adjudged by the whole court; 1st. That the estate devised to *Mary* was a good estate in special tail; that is, to her and the heirs-male of her body begotten by a *Searle*; 2d. That the words upon condition, &c. though express words of condition should be taken to be words of limitation; 3d. That the estate tail of *Mary* did not cease by marrying



ing a person whose name was not *Searle*, because she might possibly survive her first husband, and afterwards marry a person of the name of *Searle*; 4th. That if the estate had been devised to *Mary*, and the heirs-male of her body, by a *Searle* to be begotten, provided, and upon condition, that if she married any other person but a *Searle*, the estate should go over, a common recovery suffered before marriage would bar the estate tail and remainders; and the court took a difference between a collateral condition, and a condition that runs with the land; for if a donor reserves a rent with a condition to re-enter, a recovery will not bar it; *aliter*, if the condition be to re-enter for non-payment of a sum in gross.

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1 Mod. 108,  
111.  
2 Lev. 28.

238. So where lands were devised to several persons successively in tail, and a clause was inserted by the testator, that whenever the estates devised should come to any of the persons therein named, they should take upon them the name of *W.* only.

Gulliver v.  
Athby,  
4 Burr. 1929.

The first person to whom the lands were devised in tail, suffered a common recovery of

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Amb. Rep.  
328.

of the estate tail, in which he was vouched, and vouched over, and never took the name of *W.* the person who was next in remainder, entered for a breach of the *proviso*, on account of the first devisee's not having changed his name. It was agreed by the whole court, that if this *proviso* were considered as a condition, it was collateral and subsequent, and was therefore well barred by the recovery.

Driver ex  
dem. Edgar  
v. Edgar.  
Cowper 379.

239. *Devereux Edgar* being seised of the premises in question, devised them as follows: "I give and bequeath unto my  
" daughter *Temperance Edgar*, all that my  
" farm or estate called the *Breed Farm*,  
" &c. to hold the same from and after the  
" death of my wife, to the said *Temperance*  
" my daughter, and to the heirs of her  
" body lawfully begotten, and for want of  
" such heirs, to my right heirs for ever.  
" *Item*, I give and bequeath unto my  
" daughter *Mary Edgar* all that my farm,  
" &c. to have and to hold to the said *Mary*,  
" and to the heirs of her body lawfully to  
" be begotten, and herein my mind and  
" will is further declared, that in case either  
" of my said daughters *Temperance* or *Mary*  
" shall happen to die, or depart this life,  
" single,

“single, married, or widows, not leaving  
 “children or child living at their decease  
 “legally begotten, that then her gift, le-  
 “gacy, or bequest herein, or estate given  
 “her by this my will, shall be entirely void  
 “as to inheritance of heirs, and of none  
 “effect; and the estate so given her, so  
 “dying without heirs of her body, shall  
 “descend and go to my heir male and his  
 “heirs male.” *Mary Edgar* suffered a re-  
 covery of the premises in question, to  
 the use of herself in fee, and afterwards died  
 unmarried.

The question was, Whether the recovery  
 suffered by *Mary Edgar* barred the limita-  
 tion over?

Lord *Mansfield* said, the validity of the  
 recovery suffered by *Mary* depended upon  
 whether she was tenant in tail, or tenant  
 for life of the estate thus devised to her.  
 Now the estate was given to her and the  
*heirs of her body*, which was an estate tail:  
 nevertheless, the intention of the testator  
 might restrain that estate of inheritance,  
 and confine it to an estate for life only; and  
 although it was insisted, that the testator  
 had restrained the estate of inheritance dur-  
 ing



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ing her life, yet he had only restrained it upon future contingencies, the first of which was the event of her own death; but until that contingency happened, the inheritance was in her. The second was upon her leaving no children. It was manifest that the intention of the testator was, to prevent a common recovery being suffered; but where a testator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, *Mary Edgar* was tenant in tail to the hour of her death, nothing was so clear as that all conditions limited upon such an estate tail, were avoided by the common recovery which had been suffered; and the court were of opinion, that *Mary* took an estate tail by the devise.

Ferne 314.

240. Although a common recovery suffered by a tenant in tail bars all collateral conditions subsequent, and limitations over; yet a common recovery has this operation only when suffered by a tenant in tail; for a recovery suffered by a tenant in fee simple will not bar an executory estate, conditional limitation, or collateral condition, as will be shewn in a subsequent chapter.

241. If

241. If a gift in tail be made, rendering a rent, and the tenant in tail suffers a recovery, it will not bar the rent, which will still remain as a collateral charge on the land distrainable of common right; for since the tenant in tail took the land subject to that charge by the original donation, the recoveror who claims under him can only have the estate in the same manner as he who suffered the recovery had it. But if there had been a condition of re-entry, on the non-payment of the rent, it would have been destroyed.

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Whyte v.  
Weit, Cro.  
Eliz. 792.  
2 Lev. 30.  
1 Mod. 109.  
Pigot, 139.

242. A common recovery bars all contingent remainders depending on the estate whereof the recovery is suffered, because the recovery destroys the particular estate on which the contingent remainders depend.

*Contingent  
Remainders.*

Thus were a person devised lands to his eldest son *Thomas* for life, and if he died without issue living at the time of his death, then he devised the lands to another son and his heirs; but if *Thomas* had issue living at the time of his death, that then the fee should remain to the right heirs of *Thomas* for ever. *Thomas* entered upon the death

Plunkett v.  
Holmes,  
1 Lev. 11.  
Sir T. Ray.  
28.  
Gilb. Uses.  
133.

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death of his father, and suffered a common recovery, and afterwards died without issue.

It was resolved, that *Thomas* was tenant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was destroyed by the recovery.

Loddington  
v. Kime,  
1 L. Raym.  
203.  
Salk. 243.  
3 Lev. 431.  
Fearn 282.

243. So where lands were devised to *A.* for life, without impeachment of waste; and in case he should have any issue male, then to such issue male, and his heirs for ever, and if he should die without issue male, then to *B.* and his heirs for ever. *A.* entered, suffered a common recovery, and died without issue; and it was held, that the remainders over being contingent, were barred by the recovery.

Carter v.  
Barnadiston.  
1 P. W. 505.  
2 Brown 1.

Another case arose on this will, in which the same point was determined by the House of Lords. And in the cases of *Doe ex dem. Brown v. Holm*, 3 *Wilson's Reports*, 237. *Goodwright v. Dunkam*, *Douglas* 264. and *Goodright v. Billington*, id. 753. this doctrine is confirmed.

244. A com-



244. A common recovery suffered after an erroneous fine, will bar the issue in tail from bringing a writ of error to reverse the fine, and even an erroneous recovery will bar a writ of error to reverse a fine until the recovery is reversed, because a common recovery with voucher bars every kind of right which the vouchee or his heirs can have to the land; but a void recovery is no bar.

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Writ of Error.

Thus where *R. Barton*, being tenant in tail, levied an erroneous fine, and afterwards a writ of entry was brought against the cognizee, who appeared and vouched over *R. Barton*, and he vouched over the common vouchee. After the death of *R. Barton*, the issue in tail brought a writ of error to reverse the fine, to which the recovery was pleaded in bar. And it was resolved, that when tenant in tail levies an erroneous fine, he hath yet a right to the land, which by his entry into the warranty, and recovering thereby an intended recompence in value is barred. For although tenant in tail cannot by deed release errors to bar the issue in tail, yet as by fine or recovery he may bar the estate tail itself, so

*Barton v. Lever, Cro. Eliz. 388.*

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may he bar the writ of error; and when he enters into the warranty and vouches over, and hath recompence, he is in by his warranty of all estates, and the recompence in value is a sufficient bar to all estates and rights which he had in him.

CHAPTER XII.

Of some other Effects of a Common Recovery.

245. **A** Common Recovery suffered by a tenant for life, without the concurrence of the person in remainder or reversion, operates as a forfeiture of his estate for life, in the same manner as if he had levied a fine, or made a feoffment in fee.

*Operates as a Forfeiture of an Estate for Life.*

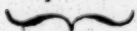
Pelham's Case,  
1 Rep. 15.

This doctrine was deduced from the Common Law; for if a demandant in a real action recovered against a tenant for life by default, or *nicnt dedire*, or by pleading conventionally, to the disherison of the person in reversion, the tenant for life forfeited his estate: for he was entrusted with the freehold, and was to answer the *præcipes* of strangers, and defend his own, as well as the reversioner's estate; so that when he gave way to the demandant's action, or vouched a stranger, he admitted the reversion to be in such demandant or stranger,

1 Inst. 35. b.  
252. a.



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 Doe v. Lord  
 Mulgrave,  
 5 Term  
 Rep. 320.

and consequently denied the tenure of the reversioner, which was a forfeiture.

246. If a tenant for life has also an estate in remainder, he may then suffer a common recovery without incurring a forfeiture.

Smith v.  
 Clifford,  
 1 Term Rep.  
 738.

One *Richards* being tenant for life, with remainder to his first and other sons in tail, remainder to the heirs of his body. *Richards* conveyed his estate by lease and release to a third person to make him tenant to the *præcipe*, and suffered a recovery.

The question was whether this recovery operated as a forfeiture.

Ante f. 130.

The court was of opinion that the recovery did not operate as a forfeiture. That the passage in 1 *Inst.* 35. *b.* could only be understood of a bare tenant for life who took upon himself to do an act inconsistent with the nature of his estate, and which before the statute of 14 *Eliz.* would have displaced the remainders. The forfeiture of his estate was therefore a proper punishment upon him for attempting to do an act inconsistent with his tenure, and calculated

to injure the person in reversion. But the law will never punish a man for doing that which is not inconsistent with the nature of his estate, and which may have a legal operation. Such was this case, for *Richards* stood in two several characters, that of tenant for life, with a remainder in tail subsequent to that limited to his first and other sons. This remainder in tail was all that he sought to bar, and the law says that having the immediate freehold, and an estate tail in remainder in him, he has a right to bar it.

The next thing then was, whether the recovery itself would operate so as to subject him to a forfeiture, and as to this the court were unanimously of opinion that it did not, because there was a legal subject for it to work upon, namely, his remainder in tail. *Richards* was vouched and entered into the warranty, not in respect of his tenancy for life, but of his remainder in tail; and the recompence in value is supposed to go to those who would have been intitled to his estate tail and those who stood subsequent to them, and passed over his first and other sons, who had the first estate tail in them; and as they received no recom-

U 3

pence,

Vide ante  
Mereuth v.  
Leslie, f. 210.  
S. P.

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pence, their estate was not displaced or in any manner affected by the recovery.

Comp. Cop.  
f. 357.

247. It is said by Sir *Edward Coke*, that if a copyholder for life suffers a recovery by plaint in the lord's court, as copyhold of inheritance, this is a forfeiture *ipso facto*.

Keen v. Kirby, 1 Mod.  
199. 2 Mod.  
32.

This doctrine is contradicted by a determination of the court of Common Pleas, 27 *Car. 2.* in which it was resolved, that when tenant for life of a copyhold suffers a recovery as tenant in fee, it is no forfeiture of his estate, for the freehold not being concerned, and it being in a court baron, where there is no estoppel, and the lord who was to take advantage of it, if it were a forfeiture, being a party, it was not to be resembled to the forfeiture of a free tenant. And that customary estates had not such accidental qualities as estates at common law, unless by special custom.

*Estoppel.*  
Pigot 123.

Ante f. 53.

248. The judgment in a common recovery being of equal force with a judgment obtained in an adversary suit, will operate as an estoppel against all those who are parties to it, and conclude them from averring any thing against it. But a common recovery,



covery, when suffered of an estate tail, will not operate as an estoppel against the issue in tail, the remainder-men, or reversioner.

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10 Mod. 45.

249. If a tenant in tail by purchase, under a marriage-settlement made by his ancestor *ex parte materna*, with the reversion in fee by descent *ex parte materna*, suffers a common recovery to the use of himself in fee, this estate will descend to his heirs *ex parte paterna*.

*In some cases  
alters the  
Descent.*

Thus where *John Tregonwell*, being seised in fee of the lands in question, upon the marriage of *Mary* his eldest daughter with *Francis Luttrell*, by indenture executed in the year 1680, covenanted to levy a fine, and suffer a recovery to the use of himself for life, remainder to *Francis Luttrell* for life, remainder to his daughter *Mary* for life, remainder to the first and other sons of the said *Mary* by the said *Francis Luttrell*, remainder to the first and other sons of the said *Mary* by any other husband, with remainder to his own right heirs in fee.

Martin ex  
dem.  
Tregonwell  
v. Strachan,  
1 Stra. 1179.  
1 Will. Rep.  
66.  
5 Term Rep.  
107. note.

A fine was levied, and a recovery suffered, to the uses of this indenture.

U 4

On

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On the death of *Francis Luttrell*, without issue male, the said *Mary*, married Sir *Jacob Banks*, and had issue by him a son named *Jacob*, who, on the death of his father and mother became seised of an estate tail, in the said premises, and of the reversion in fee, *ex parte materna*, and in the year 1725, suffered a common recovery in the usual form, having by a deed of bargain and sale inrolled, made a tenant to the *præcipe*, and declared by the same deed, that such recovery should be and enure to the use of himself and his heirs, and died without issue. Upon the death of *Jacob Banks*, *John Strachan* entered into the lands in question, as heir *ex parte paterna*, and *Thomas Tregonwell* brought an ejectment against him, claiming those lands as heir to the said *Jacob Banks*, *ex parte materna*.

The question was, whether this recovery did or did not operate as a new purchase, and thereby alter the descent?

The court of King's Bench were of opinion, that this recovery altered the nature of the estate, and made it descendible to the heirs *ex parte paterna*.

A writ

A writ of error was brought from this judgment in the House of Lords, and on behalf of the plaintiff in error, who claimed *ex parte materna*, it was argued, that the rule of law is clear, that the estate of one dying seised by descent *ex parte materna*, can descend to none but the heir *ex parte materna*, it being founded on natural justice, that an estate should go to the blood and family from whence it came, where the owner himself has not thought fit to give it away from them: that this estate was originally the inheritance of *Jacob Banks's* mother and her ancestors; and therefore, if there had been no interruption in the course of descent, it must now descend to the plaintiff: that the only interruptions insisted on were the settlement of 1680, and the recovery and deed of uses in 1725. As to the former it was only a temporary interruption of the possession, by the particular or partial estates carved out of the fee, the inheritance being still left to descend *ex parte materna*; and whenever those particular estates should determine, whether by the death of the parties, or by bar or extinguishment of them, the possession would return to the old inheritance again: and as to the latter, the recovery and deed

of



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of uses only determined, and barred the particular estates, and consequently let the fee into possession, in the same condition and quality as when in reversion, and therefore could not alter the nature of the antient use, or the descendible quality of it: that this is clearly the case where a fine is levied by tenant in tail, who has the reversion in fee in himself, it having been settled, that such a fine extinguishes the estate tail, and lets the old reversion into possession; nor is there any material difference between a fine and recovery; for, so far as their respective powers reach, they are both universally held to be bars of the particular estates and conveyances of their own inheritance in fee.

It is objected, that a recovery not only bars the estate tail but the remainders also. But that distinction is totally immaterial, because it affects only the extent of the bar or extinguishment, not the manner in which those instruments operate; it proves the recovery to be a bar or extinguishment of the estates tail, both in possession and remainder, but does not prove it to be less a bar or extinguishment of either; and the bar or extinguishment of both, by the recovery,

recovery, as much lets in the reversion in fee after both, as a bar or extinguishment, by fine of one, lets in the reversion in fee dependant on that one only: that this distinction could not be applicable to the case of a recovery by tenant in tail, with an immediate reversion in fee in himself; and it would be extremely difficult to maintain, that in such a case the use would be the old one, and go *ex parte materna*; but that in the present case, it was a new one, only, because there was an intermediate remainder in tail, which was equally, and but equally, barred with the estate tail in possession; or if that should be admitted to be no material point of distinction, it would be as hard to maintain, that if tenant in tail, with reversion in fee in himself, descending *ex parte materna*, bars the estate tail by fine, the resulting or declared use in fee to himself, would be the ancient use, and go *ex parte materna*; but that if the same tenant in tail bars the same estate tail by a recovery, the resulting or declared use would be a new use, and go *ex parte paterna*: that it was apprehended no case could be cited to warrant this distinction; and if not, reason and equity pointed out that they ought both to have the same effect.

It

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It is also objected, that a recovery is the proper conveyance of a tenant in tail, with remainder over, and therefore operates as a grant from him; and that the recoveror comes in under him, in the *per*, as his grantee, and therefore as a purchaser. But this would be, to make the recovery operate, not as a bar to the particular estates tail in possession and remainder, which is the sense and language of all the books, but as a bar to his own reversion in fee, which is absurd; nor indeed is a recovery, in any other sense, a grant from the tenant in tail, than as it is a common assurance, by which he may bar those particular estates, and acquire or convey the fee simple in possession: but it is not less such an acquisition, if he gets it by barring the particular intermediate estates, and letting his own fee into possession, than if it could be said to be a grant of the estate tail itself to himself in fee. But whatever might be the case, where the estate tail in possession, together with the remainder or reversion in others, include the whole inheritance, yet where the tenant in tail in possession has also the reversion in fee, the recovery operates as a conveyance of the reversion, and a bar to the intermediate estates. A recovery



recovery is not a sort of conveyance more proper to bar remainders, than a fine is to bar an estate tail alone; nor can the recoveror come more under the tenant in tail, or his estate, or be more properly a grantee from him of his estate tail, than the conusee of a fine is under the conusor; and yet, in this latter case, that notion clearly does not prevent the estate tail from merging in the fee.

It is, however, further objected, that the estate tail is continued and enlarged by the recovery; but this is at best a very inaccurate manner of speaking, if not unintelligible or absurd, since an estate tail cannot continue longer than the issue *per formam doni*; and a fee simple cannot with any propriety be called an enlarged estate tail. The only reasonable sense of such expression, is, that the tenant in tail, by exercising the power which the law has given him, of barring the estate tail, has become possessed of the absolute fee in possession; but in this sense it is no otherwise an enlargement of his estate, than a surrender of tenant for life to the remainder-man in fee, is an enlargement of the remainder-man's estate, and is therefore more properly an enlargement.

enlargement of the fee simple, by sinking the particular estate, than an enlargement of the particular estate, which is absolutely destroyed, nor does this manner of considering the recovery, in the least injure the absoluteness of that power which the law gives the tenant in tail over the estate, because he acquires as much this way as the other, with this advantageous circumstance, that it keeps the estate in its natural channel, and prevents the act done for one purpose only, from enuring to another, which the party never thought of, and which, if he had, he might, and probably would have avoided.

In support of the judgment it was contended, that *Jacob Banks* being tenant in tail, under the settlement of 1680, by purchase, and not descent, the rule of descent, relied on by the plaintiff in error, was only applicable where the person whose estate is in question was, at the time of his death, seised by descent, and no way affected or influenced the present question, if *Jacob Banks* acquired the fee by suffering a recovery, as tenant in tail by purchase: that a tenant in tail is considered in law as possible owner of the whole fee, *viz.* that the remain-

remainders and reversions are in his power by suffering a recovery, which is the act of tenant in tail, and takes its effect out of the estate tail, in right of which alone he is empowered to suffer such recovery, as he thereby acquires, in judgment of law, an absolute and pure fee against the remaindermen and reversioner, although the reversion were in a stranger; whereas, by a fine, the estate tail is only extinguished, and barred, as against the issue in tail; but, as to the remaindermen, or reversioner, it subsists, notwithstanding that act, as a base or determinable fee, on failure of issue: it was therefore apprehended, that by the recovery, which removed all restraints and limitations ensuing or dependent after the estate tail, the fee so acquired by *Jacob Banks*, proceeded out of the estate tail, and took its effect to the use of the person so enabled in law to suffer the same, as the result of his power, in virtue of the estate tail, which was gained by settlement (*i. e.*) by purchase, and consequently the remainders and reversions which subsisted before the recovery were alike extinguished, and put to an end, by force and operation of such recovery: that  
if



if the estate tail, as to the issue only, is considered as barred by a recovery, and the old estate in fee or reversion, subject to the estate tail, is let in, and takes place as contended for by the plaintiff, the consequence and inconvenience thereof would be, that in that case every estate in the kingdom, of which a recovery is suffered by a tenant in tail, seised also of the reversion in fee, would still remain liable as assets by descent to the specialty debts of the ancestor, from whom it descended (for the estate tail, while it subsists, and the base fee, gained by force of a fine, suspends the remedy, so long as there is issue, and therefore preserves the debts,) and this form of conveyance, invented and long used to strengthen the title of possessors who are tenants in tail, would be a means of destroying such intention, and would revive old demands to the ruin of many families.

After hearing counsel on this writ of error, the judges (who attended according to order) were directed to deliver their opinions on the following question, *viz.* “ whether, upon the death of *Jacob Banks*, the estate in question did by law descend to his heir, on the part of the mother, or

“not?” And the judges, having taken time to consider, the Lord Chief Justice of the Common Pleas, delivered their reasons at large, and concluded with their opinions, “that the estate in question, upon the death “of *Jacob Banks*, did not descend to his “heirs on the part of the mother.” Whereupon it was ordered and adjudged, that the judgment given in the court of King’s Bench should be affirmed.

249. The principle upon which this case was decided is, that by the recovery the estate tail was converted into an estate in fee; and as *Jacob Banks* took the estate tail as a purchaser, he must have taken the fee as a purchaser also, and consequently it descended to his heirs *ex parte paterna*; but in the case of an estate tail by descent; a recovery will not make it descendible to the heirs *ex parte paterna*, where it was before descendible to the heirs *ex parte materna*, and this doctrine extends as well to copyhold as to freehold estates.

*Catherine Booker* being seised of an estate tail by purchase with the reversion *ex parte materna*, and of another by descent *ex parte materna*, of which part was copyhold, joined with her husband in suffering a recovery of

Roe v. Baldwin, 5 Term. Rep. 104.

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the freehold estates in the court of Common Pleas, and of the copyholds in the court of the manor. It was resolved, that the operation of a recovery suffered of a copyhold estate was, as to this point, precisely similar to that of a recovery suffered of a freehold estate; as it would lead to perplexity if different rules were applied to different sorts of estates.

Ante s. 247.

That the court was bound to adopt the doctrine laid down in the case of *Martin v. Strachan*, and therefore, that part of the estate which the person who suffered the recovery took by purchase, must go to the heir *ex parte paterna*, and that which she took by descent from the maternal ancestor, to the heirs *ex parte materna*.

Abbot v.  
Burton, 11  
Mod. 181.

250. It follows from the same principle that a recovery suffered of an estate in fee simple will not alter the nature of the descent.

*Revocation of  
a De. use*

Fines, s. 388.

251. A common recovery operates as a revocation of a prior devise of the lands whereof the recovery is suffered, upon the same principle that a fine has that effect.

Thus,



Thus, where a tenant in tail made his will, whereby he devised his estate tail, and afterwards suffered a recovery. It was unanimously adjudged, that the recovery was a revocation of the will, because the estate was thereby totally altered.

Dister v.  
Dister,  
Lev. p. 3.  
108.

252. So where Sir *Henry Marwood*, Bart. being seised in tail male, with remainder to himself in fee, of a considerable estate in *Yorkshire*, made his will, and devised this estate to his nephew, to whom his title was to descend. Afterwards Sir *Henry Marwood* did, by lease and release convey his estate tail, to trustees and their heirs, to the use of them and their heirs, in order to make them tenants to the *præcipe* for suffering a common recovery, which common recovery was in the beginning of the deed, said to be for docking and barring of all estates tail and remainders, and for vesting the fee simple of the premises in Sir *Henry* and his heirs. The recovery was accordingly suffered, and it was decreed that it operated as a revocation of the will, it being a solemn conveyance upon record, and stronger than a feoffment: for the recovery being suffered by the tenant in tail, he thereby acquired an absolute estate in fee simple

Marwood v.  
Turner,  
3 P. Wms.  
163.

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2 Atk. 324.

derived out of the estate tail, which fee was never devised; consequently it was even stronger than the case, where a man having lands devises them, and afterwards makes a feoffment of them, though to the use of himself and his heirs, and though that be the old use, and the old estate, yet the feoffment amounts to a revocation.

Darley v.  
Langworthy,  
Dom. Proc.  
1774.

253. *Vincent Darley* being seised and possessed of several real and leasehold estates made his will by which he devised all his real estates in the counties of *Devon* and *Cornwall* to the respondent *Langworthy* in strict settlement.

Some years after making this will, the testator suffered a common recovery of several parts of the estates thereby devised, and by proper deeds and conveyances declared the uses of such recovery to himself in fee.

The heir at law of the testator filed his bill in the Court of Chancery, insisting that as the recovery was suffered by the testator long after the making of his will, and as the testator did not republish the same, or make any other will of the said estates after suffering

suffering such recovery, the will was thereby revoked, with respect to any devise therein made of any of the premises included in the recovery, and that they descended to the heir at law.

The cause was heard before Lord Chancellor *Camden*, when his Lordship ordered a case to be stated for the opinion of the court of Common Pleas upon the following question, *viz.* "Whether the deed executed and the recovery suffered by *Vincent Darley* was a revocation of the will." And the case having been fully argued before that court, the judges certified their opinion that the deeds executed and recovery suffered by the testator *Vincent Darley* were a revocation of his will as to the lands comprised in the recovery.

3 Will. Rep.  
6.

The Lord Chancellor decreed accordingly, and the House of Lords affirmed the decree as to this point.

254. In the case of *Parsons v. Freeman*, the same point was determined, and Lord *Hardwicke* is reported to have said, that if a recovery be for a particular purpose, then it shall revoke no further than to answer

3 Atk. 74

11 2.

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that purpose, as where a testator creates an estate for years, or for life, in the lands devised, it shall operate no further.

*Lets in prior  
Incumbrances.*

1 Rep. 62. a.  
2—52. b.  
Pigot 120.  
1 Wilfon's  
R. 277.

255. A common recovery suffered by a tenant in tail, lets in all his preceding incumbrances, and renders valid all the acts of ownership which he has exercised over the estate tail. So that if a tenant in tail makes a lease not warranted by the statute 32 H. 8. or acknowledges a judgment or recognizance, and afterwards suffers a common recovery, it will operate as a confirmation of these charges which were before defeasible by the issue; for the recoveror acquires an estate in fee simple derived out of the estate tail, and therefore all those acts which bound the tenant in tail will also bind the recoveror, who cannot aver that the person against whom he recovered had but an estate tail.

It is therefore extremely dangerous for a tenant in tail, who has made leases, acknowledged judgments, or incumbered his estate tail in any other manner, to suffer a common recovery, because all those incumbrances will thereby become valid, and take

take place before any charge which is made on the lands after the recovery.

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256. Although a recovery be suffered for a particular purpose, yet it will confirm all prior incumbrances.

In the case of *Goddard v. Complin*, the following question was put: Tenant in tail mortgages for years, and afterwards, in consideration of marriage, suffers a recovery, for the purpose of settling a jointure on his wife. Whether this recovery should enure to make good the mortgage, it being only designed for establishing the marriage settlement? It was answered, that if there had been no recovery, there could have been no jointure, nor could the wife have avoided the mortgage, for she was in by the act of her husband, and no subsequent act of the husband could have avoided the mortgage. It was also said, that if a tenant in tail confesses a judgment, &c. and suffers a recovery to any collateral purpose, the recovery shall enure to make good all his precedent acts and incumbrances.

1 Chan. Ca.  
119.

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257. Where a tenant in tail makes any conveyance or settlement of his estate tail, which is not binding on his issue; if he afterwards suffers a common recovery, it will enure to make good the preceding conveyance or settlement.

Goodright  
ex dem.  
Tyrrell v.  
Mead and  
Shilson,  
3 Burr. 1703.

Thus, where a person who was seised to him and the heirs male of his body, remainder to his own right heirs, by lease and release, previous to his marriage, conveyed his estate to trustees, to the use of himself for life, remainder to the use of his intended wife for life, remainder to his first and other sons in tail male; the marriage took effect, and they had issue a son: nineteen years afterwards the husband suffered a common recovery, and declared it to be to the use of *A. B.* and his heirs, in trust to sell the premises for the payment of his debts; *A. B.* sold the lands for the payment of the debts, according to the trust reposed in him; the tenant in tail died, and his son claimed the lands.

The court were unanimously of opinion, that the recovery enured to the uses of the settlement, and therefore that the purchaser had no title.

258. *Gerard*



258. *Gerard Walker* the father by settlement on his marriage conveyed an estate to the use of himself for life, remainder to the first and other sons of the marriage in tail.

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Cheney v.  
Hall, Amb.  
Rep. 526.

In 1733 the son on his marriage conveyed part of the estate by lease and release to the use of himself for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs.

In 1746 the father and son mortgaged the premises to *Henry Peach* for 1000 years to secure 300*l.* and suffered a common recovery and declared the uses to the mortgagee and then to the father for life, remainder to the son in fee.

Lord *Hardwicke* was clearly of opinion that the recovery enured to the uses of the settlement of 1733.

259. The principle that a common recovery shall operate as a confirmation of any preceding incumbrances created by the person who suffers such recovery, is founded in natural justice, which forbids men to defeat

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Fines f. 374.

defeat their own contracts. But where a tenant in tail, with the reversion in fee in himself, creates incumbrances, and his son (on whom the estate tail and reversion in fee descends) suffers a recovery, it will not, like a fine, operate so as to let the reversion into possession, and thereby make it liable to the debts of his father; because the operation of a recovery is to destroy all remainders and reversions expectant on the estate tail, and the fee acquired by the recoveror proceeds out of the estate tail.

It follows from these principles, that where a person is tenant in tail by descent, with the reversion in fee in him also by descent, he ought never to bar his estate by fine only, but ought also to suffer a common recovery, which will effectually prevent the estate thus acquired from becoming liable to the debts or contracts of his ancestor.

C H A P T E R XIII.

What Persons, Estates, and Interests,  
are not barred by a common Recovery.

260. **N**O persons are barred by a common recovery but those who are parties to it, and the issue in tail, the remainder-men, and reversioners, and persons claiming under conditional limitations expectant on, or to take effect after estates tail.

*Persons who  
are not Parties.*

Thus if lands are given to a husband and wife, and the heirs of the body of the husband, remainder over, and the husband alone suffers a common recovery in which he comes in upon the voucher and vouches over, such recovery will bar the estate tail, and the remainder over; but it will not bar the wife's estate, because she is not a party to it.

*Pigot 65.*

261. No



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*Estates precedent to that of which the Recovery is suffered.*

261. No estates or interests are barred by a common recovery, but those which are subsequent in point of limitation to the estate of which the recovery is suffered; for all interests precedent remain as they were before.

Pigot 137.

262. Thus, although a recovery be a good bar to a remainder for years limited, to commence after the determination of an estate tail; yet if such term be limited to arise before the estate tail, it will not be barred by a recovery suffered of the estate tail.

Pledgard v.  
Lake,  
Cro. Eliz.  
718.  
Dyer 51. b.  
in Mar.  
Poph. 5.

*A.* being tenant for life, remainder to *B.* in tail, *B.* made a lease for years, to commence after the death of the tenant for life. The tenant for life afterwards suffered a common recovery, in which the remainder man in tail was vouched: and it was determined that the term for years was not barred by the recovery, but that the lessee might falsify it.

1 Inst. 204,  
b. note.

263. If a person is tenant for life, with remainder to trustees to preserve contingent remainders, remainder to his first and other

other sons in tail male, remainder to his daughters as tenants in common in tail, remainder over: and having a daughter, he joins with her in suffering a common recovery, it will be good against the tenant for life, and his daughter, and the remainderman: but the estates-tail limited to the first and other sons, being prior to the estate of the daughter, and being supported by the limitation to the trustees, will not be affected by the recovery.

264. A common recovery does not bar an executory devise, unless the person to whom the executory devise is given, comes in as a vouchee.

*An Executory Devise.*  
Ferne 306.  
Pigot 134.

Thus, where there was a devise to *Thomas Brown* and his heirs; and if *Thomas* should die without issue, living *William* his brother, then that *William* should have the lands, to him and his heirs.

*Pells v. Brown,*  
Cro. Jac. 590.  
Palm. 131.

*Thomas* entered upon the lands thus devised, and suffered a common recovery of them.

*Thomas* afterwards died without issue, in the life-time of his brother *William*; and one

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one of the questions in this case was, whether this executory devise to *William* was barred by the recovery.

All the judges (except *Doddridge*) held, that this recovery did not bar the executory devise to *William*; for the person who suffered the recovery had an estate in fee simple, and *William* had but a possibility; so that no recovery in value could possibly extend to his estate, unless he had been a party, by coming in as a vouchee in which case, it was agreed, he would have been barred, because, by entering into the warranty, his possibility would have been destroyed.

*Estates tail  
granted by the  
Crown as a  
Reward for  
Services.*

Dyer 32. a.  
2 Rep. 15,  
50.

265. When recoveries were established as common assurances the judges determined that every species of estate tail, whether created by a subject or by the crown was barrable by a recovery, as also all such remainders over and reversions as were vested in any private persons; and even where the ultimate reversion was vested in the crown, it was fully established that a recovery would bar the issue in tail and all estates in remainder intermediate between the estate tail and the reversion vested



vested in the crown, for otherwise a perpetuity might have been created by limiting an ultimate reversion in the crown.

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266. The power thus allowed by the judges to tenants in tail with reversion in the crown, of barring their own issue was taken away by the statute 34 and 35 Hen. 8. c. <sup>20</sup>~~10~~ by which it was enacted, sect. 2. "That no feigned recovery to be had by assent of parties against any tenant or tenants in tail of any lands, tenements or hereditaments whereof the reversion or remainder at the time of such recovery had shall be in the king shall bind or conclude the heirs in tail whether any common voucher be had in any such feigned recovery or not; but that after the death of every such tenant in tail against whom any such recovery shall be had, the heirs in tail may enter, have and enjoy the lands, tenements and hereditaments so recovered, according to the form of the gift of intail, the said recovery or any other thing or things to be had, done or suffered by or against any such tenant in tail to the contrary notwithstanding."

*As the preamble of this act, for without it the conclusions it has received are not sufficiently intelligible.*

Sect.

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*Sett.* 3. and "That the heirs of every  
 " such tenant in tail against whom any such  
 " feigned recovery shall be had shall take  
 " no advantage for any recompence in va-  
 " lue against the voucher nor his heirs."

267. The object and intention of these acts was, to perpetuate in families, those estates which were given, or procured to be given to them by the crown, as a reward for some eminent services, that they might be a perpetual testimony of the munificence of the crown, and an inducement to those families, to persevere in that loyalty which was the original cause of the gift: so that now whenever a person is tenant in tail of the gift of the crown, and the ultimate reversion in fee continues vested in the crown, neither a fine or recovery, levied or suffered of such estate tail, will bar the issue in tail, the remainder-men, or the reversion which is vested in the crown.

<sup>1</sup> Inst. 372.  
 b.

268. Sir *Edward Coke* has observed, that in the construction of these statutes, the judges have laid down the ten following rules:

" 1st. That the estate tail must be cre-  
 " ated by a king, and not by any subject,  
 " albeit

“ albeit the king be his heir to the rever-  
 “ sion, for the preamble speaks of gifts  
 “ made to subjects, and none can have sub-  
 “ jects but the king; and also in the pre-  
 “ amble it is said (for service done to the  
 “ kings of the realm) and the body of the  
 “ act referreth to the preamble, and there-  
 “ fore if the Duke of *Lancaster* had made  
 “ a gift in tail, and the reversion descend-  
 “ ed to the king, yet was not that estate  
 “ tail restrained by that statute, and so of  
 “ the like.

“ 2dly. If the king grant over the rever-  
 “ sion, then a recovery suffered will bar the  
 “ estate tail, because the king had no re-  
 “ version at the time of the recovery.

“ 3dly. If the king make a gift in tail,  
 “ the remainder in tail, or grant the rever-  
 “ sion in tail, keeping the reversion in the  
 “ crown, a recovery against tenant in tail  
 “ in possession, shall neither bar the estate  
 “ tail in possession by the express purview  
 “ of the statute, nor, by consequence, the  
 “ estate in remainder or reversion, for that  
 “ the reversion or remainder cannot be  
 “ barred, but where the estate tail in posses-  
 “ sion, is barred.



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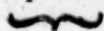
“ 4thly. If a subject make a gift in tail,  
 “ the remainder to the king in fee, albeit  
 “ the words of the statute be (whereof the  
 “ reversion or remainder of the same, &c.)  
 “ yet seeing the estate in tail was not creat-  
 “ ed by a king, as hath been said, the  
 “ estate tail may be barred by a common  
 “ recovery.

“ 5thly. If Prince *Henry*, son of *Henry*  
 “ the Seventh, had made a gift in tail, the  
 “ remainder to *Henry* the Seventh in fee,  
 “ which remainder, by the death of *Henry*  
 “ the Seventh, had descended to *Henry* the  
 “ Eighth, so as he had the remainder by  
 “ descent, yet might tenant in tail, for the  
 “ cause aforesaid, bar the estate tail by a  
 “ common recovery.

“ 6thly. The word (remainder) in the  
 “ statute, is no vain word, for the words of  
 “ the preamble be, the king hath given or  
 “ granted, or otherwise provided to his ser-  
 “ vants and subjects. The word (reversion)  
 “ in the body of the act, hath reference  
 “ to these words, (given or granted) and  
 “ (remainder) hath reference to these words  
 “ (otherwise provided) as if the king, in  
 “ consideration of money, or of assurance  
 “ of

“ of land, or for other consideration by way  
 “ of provision, procure a subject, by deed  
 “ indented and inrolled, to make a gift in  
 “ tail to one of his servants and subjects,  
 “ for recompence of service or other con-  
 “ sideration, the remainder to the king in  
 “ fee, and all this appear of record; this  
 “ is a good provision within the statute,  
 “ and the tenant in tail cannot by a com-  
 “ mon recovery bar the estate tail; so it  
 “ is if the remainder be limited to the king  
 “ in tail; but if the remainder be limited  
 “ to the king for years, or for life, that is  
 “ no such remainder as it is intended by  
 “ the statute, because it is of no remainder  
 “ of continuance, as it ought to be, as it  
 “ appeareth by the preamble, and it ought  
 “ to have some affinity with a reversion,  
 “ wherewith it is joined.

“ 7thly. Where a common recovery can-  
 “ not bar the estate tail by force of the said  
 “ statute, there a fine levied in fee, in tail,  
 “ for lives, or years, with proclamations  
 “ according to the statutes, shall not bar  
 “ the estate tail, or the issue in tail, where  
 “ the reversion or remainder is in the king,  
 “ as is aforesaid, by reason of these words  
 “ in the said act (the said recovery, or any  
 Y 2 “ thing



“ thing or things hereafter to be had, done,  
 “ or suffered, by or against any such te-  
 “ nant in tail to the contrary notwithstanding,  
 “ ing,) which words include a fine levi-  
 “ ed by such a donee, and restraineth the  
 “ same.

“ 8thly. But where a common recovery  
 “ shall bar the estate tail, notwithstanding  
 “ that statute, there a fine with proclama-  
 “ tion shall bar the same also.

“ 9thly. Where the said latter words of  
 “ the statute be (had, done, or suffered by  
 “ or against any such tenant in tail) the  
 “ sense and construction is, where tenant  
 “ in tail is party or privy to the act, be it  
 “ by doing or suffering that which should  
 “ work the bar, and not by mere permission,  
 “ he being a stranger to the act, as if tenant  
 “ in tail of the gift of the king, the rever-  
 “ sion to the king expectant, is disseised,  
 “ and the disseisor levy a fine, and five  
 “ years pass, this shall bar the estate tail (a);  
 “ and

---

(a) The only authority quoted by Sir *Edw. Coke*,  
 in support of this position, is the case of *Stratfield v.*  
*Dover, Trin. 39 Eliz.* which is reported in 1 *Cro.* 595.  
 612.



“ and so if a collateral ancestor of the do-  
 “ nee release with warranty, and the donee  
 “ suffer the warranty to descend without  
 “ any entry made in the life of the ancestor,  
 “ this shall bind the tenant in tail, because  
 “ he is not party or privy to any act, either  
 “ done or suffered by or against him.

“ 10thly. Albeit the preamble of the  
 “ statute extend only to gifts in tail, made  
 “ by the kings of *England* before the act,  
 “ (*viz.* hath given and granted, &c.) and  
 “ the body of the act referred to the pre-  
 “ amble (*viz.* that no such feigned reco-  
 “ very hereafter to be had against such te-  
 “ nant in tail) so as this word (such) may  
 “ seem to couple the body and the pream-  
 “ ble together, yet in this case (such) shall  
 “ be taken for such in equal mischief, or in  
 “ like case; and by divers parts of the act,  
 “ it appeareth that the makers of the act  
 “ intended to extend it to future gifts, and

---

612. but no judgment was given on this point and Justice *Walmesley* observed, that if such a doctrine were admitted, it would be a common mischief, for then tenants in tail of the gift of the crown might get themselves disseised, in which case a fine levied by the disseisor, would bar the issue. *Vide 1 Sid. 166. 1 Roll. Rep. 171.*

“ so is the law taken at this day, without  
“ question.”

269. As these statutes deprive tenants in tail of the gift of the crown of all power of alienation, the judges have construed them strictly; and it is observable that an estate tail of this kind is now the only perpetuity which can possibly be created.

270. It was formerly usual for persons who were seised of estates tail of this kind, to procure the consent of the crown to alienate them which was commonly effected in this manner; the crown conveyed the reversion to a subject, either in trust for itself, or for the tenant in tail, by which means a fine or recovery was a good bar of the estate tail, according to the second rule laid down by Sir *Edward Coke*.

Earl of Chesterfield's  
Case,  
Hard. 409.

Thus it was held by all the judges, that if the king made a gift in tail, reserving the reversion to himself, and afterwards permitted the tenant in tail to suffer a common recovery, by granting the reversion to a stranger, in trust, to reconvey it after the recovery was suffered, it would bar both the estate tail and the reversion, because the reversion

version was once severed from the crown, by which means the privity of estate was destroyed; for the intention of the statute was only to restrain common recoveries, where the reversion always continued in the crown without any alteration.

Since the statute 1 *Ann. st. 1. c. 7. s. 5.* this mode of evading these acts is effectually prevented, the crown being restrained by that statute from alienating its possessions for a greater estate than three lives, or twenty-one years.

271. No alteration in the limitations of an estate tail, whereof the reversion continues in the crown, will enable the tenant in tail to bar his issue or the reversion.

Thus in the case of the Earl of *Derby*, one of the questions was, Whether an estate tail, granted by *Richard 3.* to the *Derby* family, as a reward for services, which by a private act of the 4 *Jac. 1.* was limited to the heirs males of the family, in a different manner from that in which it had been limited by the letters patent, the reversion still continuing in the crown, was within the protection of these statutes? And

Murrey ex dem. Earl of Derby v. Eyton and Price, T. Raym. 260. Pollexf. 491. 2 Show. 104. Sir T. Jones 237.



CHAP. XVII.

1 Wilson  
Rep. 275.

the majority of the judges in the Exchequer Chamber were of opinion, that, notwithstanding the alterations made by the private act of parliament, as they were all within the compass of the old intail, and as the reversion still continued in the crown, the estate was within the protection of the 34 and 35 Hen. 8.

272. If a person conveys lands to the crown, with an intent that the crown should reconvey them to the same person in tail, reserving the ultimate reversion to the crown, such an estate will not be within the protection of these statutes.

Johnson ex  
dem. Earl of  
Anglesea v.  
Earl of Derby  
P. got 201.  
11 Mod. 304.  
2 Snow. 104.

Thus where *William Earl of Derby* conveyed lands to trustees, to the intent that they should convey the same to queen *Elizabeth*, her heirs and successors, that the Earl of *Derby* might accept of a grant from the crown of the same lands, to him and the heirs male of his body, leaving the ultimate reversion in the crown, which was accordingly done.

It was determined, that this estate tail was not within the protection of those statutes,

tutes, it being a fraudulent contrivance to create a perpetuity.

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27. No estate tail granted by the crown, will fall under the protection of these statutes, unless the grant appears to have been made as a reward for services.

Thus where it was found by special verdict, that one *William Dexter*, being tenant in fee of the premises, enfeoffed *Henry Earl of Derby*, afterwards king *Henry 4.* to hold to him and his heirs. Afterwards the king, by letters patent under the duchy seal of *Lancaster*, 7 *Hen. 4.* reciting the said feoffment, and that *Margaret* the wife of *John Milton* was grand-daughter and heir of *William Dexter*, and that *Milton* and his wife had petitioned the king to be fully re-enfeoffed thereof; *nous voulantz cele partie soit fait, ceo que loy, bone foy, & conscience demandent*, have of our especial grace, given and granted to the said *John Milton* and *Margaret* his wife, and the heirs of the body of the said *Margaret*, the said premises, to be holden as of the king and his heirs, dukes of *Lancaster*, as of the duchy of *Lancaster* in chief for ever, with reversion to the

Perkins v.  
Sewell,  
1 Black. R.  
654.  
4 Burr. 2223.

the king and his heirs, dukes of *Lancaster*,  
on failure of issue of the said *Margaret*.

The question was, Whether the intail created by the letters patent of *Hen. 4.* with the reversion to the king in fee, was, under all its circumstances, such an estate tail as was protected from being barred by a common recovery, by virtue of the statute 34 *Hen. 8. c. 20?*

It was insisted for the plaintiff, 1st. That no estate was intended to be protected by that statute but such as had been *given* or *provided* by the king in reward of some special services, because the preamble of the act speaks only of estates granted upon such considerations. 2d. That this grant appeared upon the face of it, to be merely a restitution of what belonged of right to the grantees; an act of justice, and not of bounty in the king; *ceo que loy, bone foy, & conscience demandent*; for which purpose, it must be supposed, either that a legal title subsisted in the grantees, paramount to the title of king *Henry 4.* by means of some condition or defeazance annexed to *William Dexter's* feoffment to the Earl of *Derby*, or that *Dexter* and his heirs had an equitable right,



right, and that king *Henry 4.* when Earl of *Derby*, was merely a feoffee to uses. Chap. XIII.

To this it was answered for the defendant, 1st. That if the words of an enacting clause are wider and more extensive than the preamble, the preamble shall not narrow and confine them; that though the principal purview of the act was, to protect such estates tail as were granted for services done, yet this was not the only reason. The diminution of the king's feudal rights was also expressly alledged as another reason, which would happen oftener by cutting off intails, and thereby preventing infancies and wardships. That if services were indispensably necessary to bring a grant within the protection of the statute, the law would at this distance of time presume them. That in the statute of fines, 32 *Hen. 8. c. 36.* there is the same protection of estates tail, the reversion of which is in the crown, and *in pari materia* both statutes should be uniformly construed; that in 1 *And. 140.* and 1 *Inst. 373.* where this statute is fully explained, not a word appears, to prove that services must be stated in the grant.

2d. That

2d. That an intail which had lasted three hundred and sixty years under the protection of this statute, ought not now to be shaken by presumptions and conjectures. Its having been so long unbarred, gives a presumption that the owners knew it was unbarable. The first attempt to alter the intail was in 1652, when there was no king in being, and all the crown lands, as well in reversion as in possession, were vested in trustees for sale; and if the reversion is once out of the crown, the protection is gone.

3d. That there was no ground to suppose a condition or defeazance annexed to *Dexter's* feoffment; as the feoffment is recited, and no mention made of any defeazance or condition.

4th. That supposing the Earl of *Derby* a feoffee to uses, which was not proved, still the grant of *Henry 4.* was free and gratuitous; for as the law of uses then stood, before the statute 1 *Rich. 3. c. 5.* if the king, when a private man, was seised to an use, upon the assumption of the crown, the use was extinguished, and the king became absolute owner of the estate. To re-grant it

to the feoffor might be generous and honourable, but was (legally speaking) gratuitous. But it could not be the execution of a use, because the king only grants an estate tail, reserving the fee to himself; makes it a tenure *in capite*, and to be holden of the duchy of *Lancaster*, which is quite incompatible with the idea of the Earl of *Derby's* being merely a feoffee to uses, which must have been executed in the same plight, as when the original feoffment was made.

Lord *Mansfield*.—"It is certain that the  
 "preamble of a statute cannot restrain the  
 "enacting part of it, where the enacting  
 "part is clearly larger than the preamble.  
 "But in this case, the estates mentioned in  
 "the enacting part, clearly refer to those  
 "in the preamble, by the word *such*, which  
 "runs through the whole. It must there-  
 "fore be admitted, that, in order to obtain  
 "the protection of the statute of *Hen. 8.*  
 "the estate tail must be of the *gift* or *pro-*  
 "*vision* of the king, by way of reward. As  
 "for the services, which are the considera-  
 "tion of such gift, these must, at a distance  
 "of time, be presumed, and need not be  
 "proved. To take it out of the statute,  
 "you



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“ you must shew that it is not of the gift,  
 “ or provision of the king. And, in the  
 “ present case, it is plainly not so, upon the  
 “ face of it. The petition is founded up-  
 “ on no other consideration, than that *Eliza-*  
 “ *beth Milton* was cousin and heir of *Dexter*,  
 “ who infeoffed the Earl of *Derby*. No  
 “ merits are mentioned, notwithstanding  
 “ the statute 4 *Hen. 4. c. 4.* was then recent.  
 “ The king himself states, that he was  
 “ bound to make the grant by *law, good*  
 “ *faith, and conscience.* What the circum-  
 “ stances of the fact were, cannot now be  
 “ discovered; whether a defeazance, a con-  
 “ dition, or an use, or any thing else. Nor  
 “ is it material to know. It is enough,  
 “ that the king has recited generally, that  
 “ he was *bound* to do it. It cannot there-  
 “ fore be a *gift*. As to the objection, that  
 “ the king granted only a particular estate,  
 “ and kept back the fee, that might be all  
 “ he was bound to do. Nor can we rea-  
 “ son very conclusively from the conduct  
 “ of such a prince as *Henry the Fourth.*  
 “ He might possibly do only half justice.  
 “ Such things have happened in later times.  
 “ Lord *Anglesey*, after the Restoration,  
 “ was obliged to restore the estates he had  
 “ got during the rebellion in *Ireland*; yet  
 “ many

“ many of the poor owners were glad to  
 “ compound, and take leases for 99 years,  
 “ instead of the fee. Upon the whole, as  
 “ the estate was not of the king’s gift, I  
 “ think it not within the protection of the  
 “ statute, and therefore the recovery is  
 “ good.”

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Mr. Justice *Yates* was of the same opinion, and said, the court would not stretch to enlarge the interpretation of a statute, which prohibits the natural right of alienation by tenant in tail.

274. Before the statute *de Donis*, when the king created a conditional fee, there remained nothing in the crown but a bare possibility, and if the donee had issue, and afterwards aliened, the king’s possibility was barred as well as that of the subject. After the statute *de Donis* had turned that possibility into a reversion, and after common recoveries were allowed to be common assurances, and to bar remainders and reversions, it became a question how far a recovery could bar a remainder or reversion vested in the king; and it was determined by the judges that though a recovery suffered by a tenant in tail barred the estate tail,

*Reversions*  
*vested in the*  
*crown.*  
 Fines s. 403.  
 Pigot 85.  
 Neale v.  
 Wilding,  
 1 Will. R.  
 275.

Plowd. 553.

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tail, yet it would not affect any interest which the king had in the remainder or reversion; as they did not venture to assert that the crown could be deprived of any part of its revenue, under pretence of a recompence in value, which was merely imaginary.

Pigot 85.

275. Mr. *Pigot* says that it is *vexata questio* how far at common law a remainder vested in the king was divested by recovery and discontinuance, but he afterwards admits that neither a fine nor recovery can divest any estate in remainder or reversion out of the king. He then says that if a recovery be on good title against tenant in tail, and the king has the remainder by a defeasible title, there it shall divest the remainder out of the king, and restore and remit the right owners.

Plowd. 553.

276. This position is founded on the determinations in *Wiseman's case* 2 Rep. 15. and *Cholmeley's case* id. 50. where the court determined that the limitation of the reversion to the crown was void, and therefore that such reversion was barred by a recovery: but it was admitted that if the reversion had been vested in the crown it could not have been barred.

177. The



277. The only mode of acquiring a good title to an estate tail whereof the reversion is in the crown is by an act of Parliament, enacting that the reversion shall be divested out of the crown and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by a recovery.

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Vid. Strickland's act,  
30 Geo. 3.  
f. 51.

278. By the statute 21 Hen. 8. c. 15. it is enacted, that no estate held by statute merchant, staple, or elegit, shall be barred by a common recovery.

*Tenants by  
Elegit, &c.*

279. By the stat. 11 Hen. 7. c. 20. no estate held by a woman in dower, or as a jointure can be barred by a recovery suffered by such woman.

*Estates held in  
dower  
&c.  
Ante f. 132.*

## CHAPTER XIV.

How Common Recoveries may be  
Reversed or Falsified.

*Writ of error.*  
*Fines l. 411.*

280. **T**HE judgment obtained in a common recovery, being a matter of record, and similar in almost every respect to a judgment given in an adversary suit, can only be reversed by a writ of error.

*Id. 414.*

281. A writ of error to reverse a common recovery must be brought in the Court of King's Bench, unless the error is in the process, in which case it may be reversed in the Court of Common Pleas.

282. By the stat. 34 and 35 *Hen. 8. c. 26. f. 113.* it is enacted that all judgments given at the Great Sessions in *Wales* shall be redressed by writ of error returnable in the Court of King's Bench in *England*.

*Who may  
bring a writ  
of error.*  
*Fines l. 415.*

283. No person has a right to bring a writ of error for the purpose of reversing a common recovery, unless he has an immediate

mediate interest in the lands, whereof the recovery has been suffered.

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Thus where a writ of error was brought in the Court of King's Bench to reverse a common recovery, and judgment was obtained thereon; but it appearing afterwards that the plaintiff in error had no immediate title to the lands, there being a remainder-man before him, the court reversed their former judgment of reversal.

Anon.  
5 Mod. 396.

284. The right to bring a writ of error descends to the person to whom the land would have descended in case the recovery had not been suffered.

9 Vin. Ab:  
498.

*Thomas Henningham* being seised to him and the heirs-male of his body, had issue *Henry* and three daughters by his first wife, and *Arthur* and two other sons by his second wife. Upon the death of *Thomas Henningham*, *Henry* his eldest son entered, and suffered a common recovery, and afterwards died without issue. *Arthur* the second son brought a writ of error to reverse this recovery, to which it was objected that he was only of the half blood. The court however determined that the right to bring a

*Henningham*  
v. *Windham*,  
1 Leon. 261.



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writ of error descended to the person who would have been intitled to the land, if no recovery had been suffered.

Ante f. 84.

1 Burr. 412.

285. In the case of *Sheepshanks v. Lucas* which has been already stated, an objection was made to the writ of error, because the plaintiff did not shew how his title arose. But the court said, that a complete title need not be set forth in a writ of error; it was only required of the plaintiff in error to shew the connection and privity between the person against whom the recovery was had, and the person who brings the writ of error; for it was not like a proceeding to try the right of land, or to recover the land itself.

Marquis of  
Winchester's  
Case 3 Rep.  
1.

286. The right of bringing a writ of error to reverse a common recovery does not pass to the crown on an attainder for high treason. A tenant in tail suffered a common recovery, the remainder-man was attainted of treason and executed; and by Act of Parliament forfeited to the king all his manors, &c. reversions, remainders, uses, possessions, offices, rights, conditions, and all other his hereditaments. The recovery being erroneous the king brought a writ

writ of error to reverse it. Adjudged that the writ was not given to the king by any words in the act of forfeiture, the party having no right of entry, but only a right of action which did not pass by those general words. But admitting the writ of error had passed to the king by the words of the act, yet it would not pass from him to a patentee by a general grant of the manor *cum pertinentiis*, and of all the interest, claim and demand therein, notwithstanding the clause *de speciali gratia*. For if the king could grant it, it must be by virtue of his prerogative (for no common person could do it) and then it ought to be by express and precise words.

287. The errors assigned in a recovery may either be in fact, or in law; but nothing can be assigned for error in a common recovery which contradicts the record; it follows from this principle that no incapacity in a vouchee can be assigned for error, where he appeared in person; but if a vouchee appears by attorney, an averment may then be made, either that such vouchee died before the day on which judgment was given, or that he laboured under some per-

Fines f. 422.

Z 3

sonal

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sonal disability which rendered him incapable of suffering a common recovery.

Antef. 83.  
1 Will. Rep.  
42.

288. Thus in the case of *Wynne v. Wynne*, one of the questions was, whether the plaintiff in error was not estopped to assign the death of the vouchee to have happened on the 10th of *May*, which was before judgment, when it appeared upon the face of the record, that she appeared by attorney on the return day of the writ of summons which was the 16th of *May*. The court were clearly of opinion that the death of the vouchee before judgment, was not contrary, but a matter collateral to the record, and properly assignable for error, and triable by a jury; for all the record said was, that the vouchee appeared by her attorney; it did not say any thing of her actual existence at the time, but put a matter in issue, which was properly triable by the country.

Holland v.  
Dauntzey,  
Cro. Eliz.  
739.

289. In a writ of error to reverse a common recovery, the error assigned was, that the vouchee was within age and appeared by attorney. All the court agreed that this circumstance might well be assigned for error after the death of the vouchee.

290. So



290. So in the case of *Stokes v. Oliver* an averment was allowed, that the vouchee, who appeared by attorney, was an infant, and the recovery was reversed.

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Ante f. 122.

291. No case has arisen where an averment of ideocy has been made against a vouchee who appeared by attorney, but in a late case which was determined in the House of Lords in *Ireland*, such an averment was held to be good, and not contrary to the record.

Vide the Appendix.

292. In a writ of error to reverse a common recovery the parol shall demur for the infancy of the tenant.

In a writ of error of a judgment in the King's Bench in *Ireland*, the case was that in a writ of error to reverse a common recovery the defendant pleaded that he was an infant and prayed that the parol might demur. To this the plaintiff demurred, and judgment was given that the parol should demur.

*Aland v. Malone*,  
Fitz. R. 114.

The judgment was affirmed.

Note, to the writ of error in this court, the defendant again pleaded his infancy and

Z 4

prayed

## Chap. XIV.

prayed the parol might demur, which was disallowed. *Non datur enim exceptio ejusdem rei cujus petitur dissolutio.*

Lord Pembroke's case,  
Rep. Temp.  
Holt 614.

293. A recovery ought not to be reversed, unless writs of *scire facias* are issued against the terre-tenants and the heir; because the errors in a recovery ought not to be examined until all the parties interested in supporting it, be before the court.

294. The issuing writs of *scire facias* to the terre-tenants is not deemed to be *ex necessitate juris*, but only discretionary in the court.

Kingston v.  
Herbert,  
2 Show. 490.  
2d. Edit.  
3 Mod. 119.

Thus on a motion in the Court of King's Bench to set aside a judgment of reversal of a common recovery on a writ of error brought there, because there was no *scire facias* to the terre-tenants. It was strongly debated and on all hands agreed to be very inconvenient, that a *scire facias* should not be to the tenants, for otherwise a purchaser might be deprived of his assurance without notice. There was urged that the terre-tenant cannot be party to the writ of error. That they had a record exemplified of the reversal. That the reversal was in 35 Car. 2. That the want of a writ of *scire*

*scire facias* must be error either in law or in fact, it would not be error in law, for that must appear upon the record itself, which it did not here. It could not be error in fact, because there was no necessity of such a writ, it was only discretionary in the court and not *ex necessitate juris*.

The court was of opinion that the awarding writs of *scire facias* to the terre-tenants was discretionary. And in a subsequent case Lord *Mansfield* said that by the established mode of proceeding there must be a *scire facias* against the terre-tenants, otherwise it is an irregularity, but no more.

Hall and Ux.  
v. Woodcock  
1 Burr. 359.

295. A release of errors from the common vouchee cannot be pleaded in bar of a writ of error to reverse a common recovery.

In a writ of error to reverse a common recovery the defendant pleaded a release of all errors by the last and common vouchee.

Lord Nor-  
rice v. Mar-  
quis of Win-  
chester, Cro.  
Eliz. 2.

It was resolved by all the judges that such release could not be pleaded for the common vouchee is put in only for form,  
and



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and in truth he renders nothing, and therefore it is against reason that his release should bar others that have the loss, and are entitled to have remedy by the reversal of the judgment.

296. By the statute 10 & 11 W. 3. c. 4. reciting that fines, recoveries and judgements were reversible at any time without restraint or limitation for any error or defect which happened therein, by the ignorance or carelessness of clerks, and sometimes by unavoidable accidents, it is enacted, *f. 1.* “ that no fine or common  
“ recovery, &c. shall be reversed or avoided for any error or defect therein, unless  
“ the writ of error or suit for the reversing  
“ of such fine, recovery, &c. be commenced or brought and prosecuted with effect  
“ within twenty years after such fine levied,  
“ or such recovery suffered.

*f. 2.* “ Provided always that if any person who shall be intitled to any such writ  
“ of error as aforesaid shall at the time of  
“ such title accrued be within the age of 21  
“ years or covert, *non compos mentis*, imprisoned or beyond the seas, then such  
“ person, his or her heirs, executors or administrators

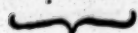
“ ministrators (notwithstanding the said 20  
 “ years expired) shall and may bring his,  
 “ her or their writ of error for the rever-  
 “ sing any such fine, recovery, &c. as he  
 “ she or they might have done in case this  
 “ act had not been made, so as the same be  
 “ done within five years after his or her full  
 “ age, discoverture, coming of sound mind,  
 “ enlargement out of prison, or returning  
 “ from beyond the seas, or death, but not  
 “ afterwards or otherwise.”

297. In consequence of this statute a writ of error to reverse a fine must be brought within twenty years after the fine has been levied, and not within twenty years after a title has accrued; for the time when the fine was levied is the period from which the twenty years are to be reckoned.

A writ of error was brought 19 *Geo. 2.* to reverse a common recovery which was suffered in 5 *Ann.* The defendant pleaded this statute in bar, the writ of error not having been brought within twenty years after the recovery was suffered, to which it was answered that the plaintiff's title did not accrue until the death of one of the vouchees without issue in the year 1739.— After several arguments the court deter-  
 VOL. II. \* mined

Lloyd v.  
 Vaughan,  
 2 Stra. 1257.

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mined that the writ of error did not lie because the statute 10 & 11 *W.* 3. was made to quiet possessions, and to fix a certain period beyond which fines and recoveries should not be impeached, for the words of the statute are express, "twenty years after such fine levied or recovery suffered." And it has not the words which are in the statute of fines, *viz.* after the title accrued. The *terminus a quo* is the time when the recovery is suffered, and if that was once exceeded, there would be no knowing where to stop; a reversioner after an estate tail which had subsisted above a century might upon this principle be allowed to reverse a common recovery, whereas persons in reversion were never the objects of the legislature's care. It was sufficient that they had a chance of the reversions vesting with the twenty years, in which case they might bring a writ of error but not afterwards.

*Writ of deceit.*

298. Where a recovery is suffered of lands held in ancient demesne it must be reversed by writ of deceit.

Rex v. Fire-  
brace,  
Barnes 258.

Thus where a writ of deceit was brought to reverse a common recovery suffered of lands



lands which were held of the manor of *Havering-Atte-Bower* in the county of *Essex*, which is antient demefne and of which the king is lord.

The defendants confessed the action, and the Attorney General remitted the damages, and prayed judgment.

A rule was made for judgment, *nisi causa*, which was absolute on affidavit of service, no cause being shewn.

299. A common recovery suffered in a copyhold court, can only be reversed by petition to the lord in the nature of a writ of false judgment. But it seems that the lord of a manor is not in all cases bound to allow of any proceedings on such a petition.

Thus where a bill was brought to compel the dean and chapter of *St. Paul's* as lords of the manor, to receive a petition in the nature of writ of false judgment for reversing a common recovery suffered in the manor court above 30 years before, whereby a remainder in tail, which the plaintiff claimed, was barred, suggesting several

*Smith v. Dean and Chap. St. Paul's, and Lewis Rugle, Show. Ca. in Parl. 67. 1 Vern. 367;*

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several errors in the proceedings, and that the said lords might be commanded to examine the same, and do right thereupon. To this bill the defendant, *Rugle*, demurred, and the dean and chapter by answer, insisted, that it was the first attempt of the kind, and of dangerous consequence, and therefore conceived it not fit to proceed on the said petition, unless compelled thereto by course of law. That *Rugle* being the person concerned in interest to contest the sufficiency of the common recovery, they hoped the court would hear his defence, and determine therein before any judgment were given against them, and that they were only lords of the manor to obey, &c. and prayed that their rights might be preserved.

This demurrer was allowed by the Master of the Rolls, and also by the Lord Chancellor.

Upon an appeal to the House of Lords, it was contended on the part of the appellant, that this was the only remedy which he had, for as no writ of error or false judgment lay for reversing a recovery or judgment obtained in a copyhold court, the  
only

only method was a bill or petition to the lord in the nature of a writ of false judgment, which of common right he ought to receive, and to cause errors and defects in such recovery or false judgment to be examined, and for this were cited *Moore* 68. *Owen* 63. *Fitz. N. B.* 12. 1 *Inst.* 60. 4 *Rep.* 30. in which such a record is mentioned to have been seen by *Fenner*, where the lord upon petition to him had for certain errors in the proceedings, reversed such judgment given in his court, 1 *Roll. Ab.* 539, 600. *Kitchen* 80. By all which it appeared, that this was an allowed and the only remedy.

That in all cases where any party having a right to a freehold estate, was barred by a judgment, recovery, or fine, such party of common right might have a writ of error, if the same were a court of record, and a writ of false judgment if in a court baron or county court. And there could be no reason why a copyholder should be without remedy when a false judgment is given; and the rather for that in real actions as this was, the proceedings in the lord's courts were according to those in *Westminster Hall*. That though a com-  
mon



mon recovery was a common assurance, yet it was never pretended that a writ of error to reverse it was refused on that pretence; and if the lord of a manor refused to do his duty, the Court of Chancery had a jurisdiction to compel him thereto. That though common recoveries were favoured, and had been supported by several acts of parliament, yet no parliament ever thought fit to deprive the parties bound by such recoveries of the benefit of a writ of error.

On the other side it was argued for the respondent, that the person who suffered this recovery had a power over the estate, that she might, both by law and conscience, upon a recovery, dispose of it as she should think fit: that she had suffered a recovery according to the custom of the manor, though not according to the form of those suffered in *Westminster-Hall*: that the suffering of recoveries in any court, and the methods of proceeding in them are rather notional than real things; and in the Common law courts they were taken notice of, not as adversary suits, but as common assurances; so that even there few mistakes were deemed so great but what were remedied by the statute of *Jeofails*, or would be

be amended by the assistance of the court: and if it were so in the courts at *Westminster*, where the proceedings are more solemn, and the judges are persons of learning and sagacity, how much rather ought this to stand which was suffered in 1652, during the times of disorder, and most proceedings informal, and in the *English* tongue, in such a mean court, where there were few precedents to guide them, where the parties themselves were not empowered to draw up their own proceedings as here above; but the whole was left to the steward, who was a stranger to the person concerned, and therefore it was hard and unreasonable that mens purchases should be prejudiced by the ignorance, unskilfulness, or dishonesty of a steward or his clerks; that there was scarce one customary recovery in *England*, which was exactly agreeable to the rules of the Common Law; that the questioning of this might in consequence endanger multitudes of titles which had been honestly purchased, especially since there could be no aid from the statutes of jeofails, for they did not extend to courts baron; that there was no precedent to enforce lords of manors to do as this bill desired; that the lords of manors

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were the ultimate judges of the regularity or errors in such proceedings; that there was no equity in the prayer of this plaintiff; that if the lord had received such petition and were about to proceed to the reversal of such recovery, equity ought then to interpose and quiet the possession under those recoveries: that Chancery ought rather to supply a defect in a common conveyance and decree the execution of what each party meant and intended by it, than assist the annulling of a solemn agreement executed according to usage, though not strictly conformable to the rules of law. The appeal was dismissed, and the decree affirmed.

*Of falsifying  
a recovery.*

300. As a common recovery can only be reversed by writ of error or some proceeding of a similar nature, to which none are intitled but those who have an immediate interest in the lands; the law allows all strangers whose interests are affected by a recovery to falsify it.

Pa. 77.

Pigot 156.

3 Reeves 362.

301. It is laid down by *Booth* in his Law of Real Actions, that a recovery may be falsified several ways. 1. By entry and plea. 2. By action. 3. By action and plea, and 4. By plea only.

By



By entry and plea, when the party's entry is not taken away by the recovery and he brings an assise, and the recovery is pleaded against him, then he pleads matter to avoid the recovery.

302. It follows from these principles, that a common recovery may be invalidated on a trial in ejectment; for if a recovery is given in evidence and set up by way of defence, the plaintiff may shew any defect in the recovery, and if the court is of opinion that the recovery is void and the plaintiff intitled to recover, such recovery is completely falsified as to that action.

Thus in the case of *Sir Butler Wentworth*, 2 Vezey 403. which was tried at the bar of the Court of Common Pleas in *Mich. Term 1744*, evidence of weakness of understanding was admitted to invalidate the deed, by which a tenant to the *præcipe* was made for the purpose of suffering a common recovery, and the effect of the recovery was by that means defeated. 3 Atk. 313. *A cited case, & see my inf. note in the former book.*

303. So in the case of *Jones, ex dem. Hale v. Cave*, tried at *Hereford* at the *Lent Assizes 1765*, by *Sir John Eardley Wilmot*,  
A a 2 evidence

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evidence was admitted to prove the weakness of understanding of the vouchee in a common recovery, who appeared by attorney, and the recovery was by that means invalidated.

A motion was made the next term for a new trial, on account of misdirection of the judge, and it was contended that such evidence ought not to have been admitted; but the motion was refused. (a)

Booth 77.  
6 Rep. 8. b.

304. A recovery may also be falsified by action and plea, when the entry of the party that has right is taken away by the recovery, and upon a real action brought, the recovery is pleaded in bar of his right. This may be falsified by plea.

*A tenant for years may falsify.*

1 Inst. 46. a.

305. By the Common Law, if the tenant of the freehold had suffered a common recovery, it operated as a good bar to all terms for years derived out of the freehold; for the person who recovered the

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(a) The cases of *Dormer v. Parkhurst*, *Goodtitle v. Duke of Chandos*, and *Taylor v. Horde*, which have been stated in the former part of this volume are instances of recoveries falsified in ejectment.

lands

lands was supposed to come in by a title paramount, so that he was not bound by the leases of the person against whom he recovered: besides, a termor for years could not in any case falsify a common recovery.

Plowd. 83.

306. By the statute of *Gloucester* 1 *Edw.* 1 c. 11. a remedy was given to the lessee for years, by way of receipt and trial, whether the recovery was upon good title, or by way of collusion, and in case it appeared that the recovery was by collusion, then the lessee for years was permitted to enjoy his term, and the execution was staid until the determination of the term.

307. The operation of this statute not having been found sufficiently extensive, another act was made 21 *Hen.* 8. c. 15. whereby it was provided that a tenant for years might falsify a feigned recovery had against the person in reversion, and that no estate held by statute merchant, staple, or elegit should be avoided by means of any feigned recovery.

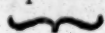
Bro. Ab. Tit.  
Lease 26.  
Fitz. N. B.  
198 and 220  
Vaugh. 127.

308. Although a common recovery can only be reversed by the Court of Common

*Courts of  
Equity.*



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Vide Fines  
f. 452.

Ferres v.  
Ferres,  
2 Ab. Eq.  
695.

Pleas in the first instance, and by the Court of King's Bench upon a writ of error from the Court of Common Pleas, yet the Court of Chancery can, in fact, invalidate a common recovery, where it appears to have been obtained by fraud or imposition, by compelling the recoveror to convey the estate to the person who is intitled in equity to have it, or by declaring the recoveror to be a trustee for such person.

Thus where a person who was deaf and dumb suffered a common recovery of intailed lands, assisted by his uncle, and then settled the same to certain uses. Upon the circumstances of the case it appeared he had done nothing but what in conscience he ought to have done, yet being under these circumstances, the Lord Chancellor said he ought to be taken care of in equity, and it appearing that the uncle was concerned in point of interest, the settlement was set aside. But had he been assisted by an able and faithful relation that was not interested, equity would not have relieved him in so reasonable an act as this appeared to be.

309. A Court of Equity will also restrain the operation of a common recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect.

Thus

Thus where a father on his son's marriage, by lease and release conveyed lands to trustees and their heirs, to the use of the father for life, remainder to his wife for life, remainder to the son for ninety-nine years, if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the son's intended wife for life for her jointure, remainder to the first and every other son of that marriage in tail male, remainder to the daughter or daughters of that marriage and the heirs of their bodies, till they should, out of the rents, issues and profits, have received 3000*l.* remainder to the heirs of the body of the son, remainder to the second son of the father, and to his first and other sons, remainder to the right heirs of the son for ever. The marriage took effect, and they had only two daughters, who being in possession after all the other estates determined, which were precedent, suffered a recovery to the use of themselves and their heirs; and one question in this case was, whether by this recovery the remainders were not barred. And it was argued that they were, because the primary intention of this limitation was to make them tenants in tail, and the rais-

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Stanhope v.  
Thacker.  
Prec. in Cha.  
435.

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ing of the 3000 *l.* was but a secondary intention thereof, and when they being so tenants in tail, suffered a recovery, this barred their estate tail, and the remainders depending thereon ; but the Lord Chancellor was clear of opinion, both upon the first speaking to it, and the next day after, that this was but in the nature of a security for the 3000 *l.* and though the recovery barred the estate tail and remainders at law, yet the daughters were but in the nature of trustees (after the 3000 *l.* raised) for those in remainder ; that before the recovery they had but an estate tail for their security for that sum ; that after the recovery they had the fee simple ; but still the same in a Court of Equity was but a security till that money was raised ; that those in the remainder had the equity of redemption in the same manner as the person who made that security would have had if no such limitation in remainder had been ; that therefore they might at any time, by paying off that 3000 *l.* determine the estate of the daughters, and then the daughters would be but trustees for them.



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# A P P E N D I X.

HOUSE of LORDS of IRELAND.

*Gustavus Hume*, Esquire, Plaintiff in Error.

*William Burton*, Esquire,  
Son and Heir of the  
Right Hon. *Benjamin*  
*Burton*, deceased, } Defendant in Error.

SIR *Gustavus Hume* being seised in fee of the lands in question, and having issue two daughters only, *Mary* and *Alice*, by indentures of lease and release, dated the 5th and 6th of *August*, 1729, conveyed his estate to trustees and their heirs, to the use of himself for life, and after his decease, to the use of *Mary Hume* his eldest daughter during her life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, remainder to the daughter and daughters of *Mary*, and the heirs of their bodies lawfully issuing, and in default of such issue, remainder

der to *Alice* his second daughter for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, remainder to the daughters of the said *Alice* and the heirs of their bodies, with divers remainders over.

After the death of Sir *Gustavus Hume*, *Mary Hume* his eldest daughter married *Nicholas Loftus*, who took the name of *Hume*, in addition to the name of *Loftus*, and was afterwards created Earl of *Ely*, by whom she had issue one son only, named *Nicholas*, who was born the 11th. September 1738.

*Alice Hume*, the second daughter of Sir *Gustavus Hume*, married *George Rockford*, Esq; by whom she had issue one son only, *Gustavus*, surnamed *Hume*, the plaintiff in error.

By virtue of the above mentioned settlement, *Nicholas*, Earl of *Ely*, the son of *Mary Hume*, upon the death of his mother, became seised of an estate tail in the lands in question; and *Gustavus Hume* was entitled to a remainder in tail, to take effect in

in possession, on the death of *Nicholas*, Earl of *Ely*, without issue.

On the 14th of *July*, 1759, the said *George Rochford*, and *Alice* his wife, and the plaintiff, *Gustavus Hume*, their son, exhibited their bill in the court of Chancery, against *Nicholas* the father, and *Nicholas* his son, and against his majesty's attorney-general, stating the settlement of 1729, and that *Nicholas* the son was born an idiot, and from his nativity had continued to be, and then was an idiot, and incapable of conducting or managing his affairs. That the said *Nicholas*, then a minor, was near attaining his age of twenty-one years, and that *Nicholas*, the father of the said minor, intended to carry into execution a scheme for his said son's suffering common recoveries of the *Hume* estate, and to send him out of *Ireland*, beyond the reach of the process of the court, and charging, that *Nicholas*, the father of the said minor, under colour of some authority from his son, though then a minor, intended to cut down and destroy the timber on the estates, and to commit other waste, and exercise other acts of ownership over the estate; and that the said minor had not sufficient capacity  
or



3 or understanding to put in an answer to the said bill, and therefore praying that the court would make a special order for the minor's personal appearance in court, and that in the mean time such order or orders might be made as the court should think fit, for the preventing the minor from suffering common recoveries, when he should come of age, and for preventing the issuing any process, preparatory to the suffering such common recoveries, until the said minor should appear in person, and that such order might be made, or process issued, as should be effectual to prevent the minor's being removed out of the kingdom, without leave of the court.

On the 16th July, 1759, *Nicholas*, the father of the said minor was served with a copy of this bill, and a subpœna to answer the same, and on the 20th of the said month the plaintiffs in the said cause petitioned the then lord chancellor, and upon the contempt incurred by the said *Nicholas* the father, for want of an appearance to the said bill, obtained an order, "that no common recovery should be suffered by or  
3 " in the name of the said *Nicholas* the son,  
" of the lands and premises in the settle-  
" ment

“ ment of the 6th of *August*, 1729, or any  
“ of them, and that no process or commis-  
“ sion preparatory to the suffering such  
“ common recovery or recoveries should  
“ issue, without the special order of the  
“ court, to be obtained upon motion to  
“ be made upon previous notice, and that  
“ *Nicholas* the father, or any other person,  
“ should not remove the person of *Nicholas*  
“ the son out of the kingdom, without the  
“ leave of the court; and that all persons  
“ should be restrained from cutting down  
“ any woods or timber trees, or commit-  
“ ting any waste upon the said estates.” In  
which cause no further proceedings were  
had by the said *George Rochford* and his  
wife, or the plaintiff.

On the 22d. of *September*, 1759, the said  
*Nicholas* came of age; yet the said *Nicholas*  
the father, refused to permit his son to ap-  
pear during the life of his said father, he re-  
maining under the said contempt whilst he  
lived.

On the 31st of *October*, 1766, *Nicholas*  
the father died, leaving the said *Nicholas*  
his only son, who succeeded to his father's  
honors and estates, and on the 17th of *De-*  
*cember*,

*cember*, in the same year, an application was made to the court of Chancery by the said *George Rockford* and his wife, that a commission might issue to try the idiocy or insanity of the then earl, an order was made accordingly, and a commission issued, directed to certain persons, commanding them personally to examine the said *Nicholas*, Earl of *Ely*, by ways and means whereby they might be fully informed, whether the said *Nicholas*, Earl of *Ely*, was an idiot or person of unsound mind, and if he was, then, whether he had been so from his nativity, or from any other, and what time.

The commissioners met, and issued their precept to the sheriffs of *Dublin* to return a jury, which was accordingly done, and witnesses were examined during five days. On the sixth day the commissioners and jury proceeded to the personal examination of the said *Nicholas*, Earl of *Ely*, and examined him for a considerable time, the chairman then gave a charge to the jury, and they found a verdict, “ that the said  
“ *Nicholas Hume*, Earl of *Ely*, in the said  
“ commission named, was not at the time of  
“ taking the inquisition, an idiot, or a per-  
“ son



“son of unsound mind;” and the commissioners agreed in opinion with the said jurors, and signed and sealed the said inquisition, and the commission and inquisition were duly returned and filed.

An application was soon after made to the court of Chancery by motion, that the order, restraining the earl from suffering a recovery of his estates might be discharged, and, after taking up four days in hearing, the order was discharged. A few days after a petition of *George Rockford* and his wife was heard, praying that the inquisition taken on the said commission might be set aside, and that the lord chancellor would be pleased to examine the earl personally, or that a new commission might issue, when his lordship declared, he saw no reason for making any order on such petition.

On the 11th of *February*, 1767, a deed of bargain and sale was executed by the earl, making a tenant to the *præcipe* for suffering recoveries, and declaring the uses thereof to himself in fee, he also signed warrants of attorney for suffering the recoveries. In the evening of the same day the deed, and also the warrants of attorney were acknowledged by the earl, in the presence

fence of the Lord Chief Justice *Clayton*, who came to the earl's house to take the acknowledgments. And a common recovery was suffered of the earl's estates, as of *Hilary* term, 1767.

In the *Trinity* term following, the earl, to prevent any objection that might be made to the former recoveries in point of form, suffered other recoveries in which the tenants to the *præcipe* were made by fine. The fines and warrants of attorney having been acknowledged before the same Lord Chief Justice.

6 Brown 229.

Mr. *Rockford* and his wife, and *Gustavus* their son, appealed to the House of Lords of *England*, from the order, discharging the order which restrained the earl from suffering recoveries, and the order, refusing a new commission, and by their petition of appeal, particularly stated, that recoveries had been suffered by the earl in consequence of those orders, that the remainders limited to the then appellants by the settlement of 1729, were thereby barred, and that the appellants were without remedy if the said orders should stand.

This

This appeal was heard in 1768, when it was determined that with respect to the order, refusing the application for a new commission, the appeal should be dismissed upon the ground, that no appeal to the House of Lords lies against an order, awarding a commission of idiocy or lunacy by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, nor against any proceedings touching the awarding or issuing such commissions. And with respect to the order which discharged the order, whereby the earl was restrained from suffering common recoveries, the same was affirmed.

On the 6th of *November*, 1769, the Earl of *Ely* executed his last will, which was duly attested, whereby he gave and bequeathed all his real and personal estate to his uncle, *Henry Loftus*, who was his heir at law *ex parte paterna*, and died in two days afterwards.

In the year 1770, a bill was filed by Mr. *Rockford* and his son, against the said *Henry Loftus*, the devisee of the last earl, and others, stating the settlement of 1729, and several of the proceedings before men-

VOL. II.                      B b                      tioned,



tioned, and charging the general incapacity of the late earl, arising as well from natural as accidental causes to manage his affairs, or do any act towards disposing of his estate; and therefore praying that the deeds, declaring the uses of the fines and recoveries might be set aside, and the fines and recoveries declared to enure to the uses of the settlement of 1729.

To this bill the defendant, *Henry Loftus*, filed two pleas, and an answer. As to so much of the bill as sought to set aside the deed, declaring the uses of the fines and recoveries, and a conveyance to the uses in the settlement of *Sir Gustavus Hume*, the defendant pleaded, that the late Earl of *Ely* at the time of executing the deed, declaring the uses of the fines and recoveries, and of levying the fines and suffering the recoveries, was of sound mind, memory, and understanding, so as to be capable of executing deeds, levying fines, and suffering recoveries, good and valid in the law.— He then stated the proceedings above mentioned and the two sets of recoveries, and the fines levied by the late earl; and he further pleaded, that by virtue of the said common recoveries the said earl became seised

seised in fee, and being so seised, died on the 12th of *November*, 1769, unmarried and without issue, leaving the defendant his uncle and heir at law, who thereupon became seised in fee of the several estates of which the late earl was seised in fee, and denied that any fraud, imposition, or undue influence had been practised upon the late earl in obtaining the said fines or recoveries.

These pleas were argued, and the Lord Chancellor was pleased to order that as to the second plea, which related to the real estates, it should stand for an answer, with liberty to except. Issue was joined, and witnesses were examined on both sides, and the cause having been heard, the Lord Chancellor dismissed the bill, as to the real estate without costs.

From this decree an appeal was brought 7 Brown 319. to the House of Lords of *England*, and after hearing counsel, it was ordered, that the decree should be affirmed.

In *November*, 1779, *Gustavus Hume*, the son of Mr. *Rockford*, brought a writ of error to reverse the recoveries suffered in *Trinity* term, 1767, in which the tenants to the *præcipe* were made by fine : and the re-

records of the recoveries being brought into the court of King's Bench, the plaintiff assigned for error, that at the time of the caption and acknowledgment of the warrant of attorney, and at the time of the said *Nicholas*, Earl of *Ely*, being called in the said court of Common Pleas to warranty, and also at the time of suing forth the writ of entry, and from thence until and at the time of rendering the said judgment, and until and at the time of the decease of the said *Nicholas*, Earl of *Ely*, and at all times from the 20th of *November*, 1759, he the said *Nicholas Hume*, Earl of *Ely*, was *non compos mentis*, and of unsound mind; so that he was not sufficient to govern himself, his lands, tenements, hereditaments, goods or chattels, and this the plaintiff was ready to verify.

*William Burton*, the heir of *Benjamin Burton*, demandant in the recovery, being formally brought before the court, pleaded to the aforesaid assignment of errors, because the said *Nicholas*, Earl of *Ely*, was *compos mentis* and of sound mind, and sufficient to govern himself, his lands, tenements, and hereditaments.

Issue



Issue being thus joined, and a jury impannelled and sworn, counsel on behalf of Mr. *Hume* the plaintiff in error, offered to produce evidence of the incapacity of the said earl, but the counsel for the defendant insisted, that the acknowledgment of the warrant of attorney before the chief justice, was a judicial act and matter of record, and was conclusive evidence of the earl's sanity, and therefore the plaintiff ought not to be suffered to go into parol evidence in contradiction to it.—The judges who presided at the trial, were unanimously of opinion with the defendant, and therefore did not permit the plaintiff to go into such evidence in contradiction to the record, but directed the jury to find for the defendant.

3

A bill of exceptions to the directions of the court on the said trial, was tendered by the plaintiff, in substance, as follows: that the plaintiff offered to give parol, written, and circumstantial evidence to prove the fact which he had alledged in pleading, and in particular, that the late Lord Chief Justice was imposed upon, and induced to take the warrant of attorney from the late Earl of *Ely* as a literate person, when in truth he was illiterate, and incapable of

B b 3

reading

reading and understanding the said warrant of attorney. And the counsel for the defendant thereupon insisted that no such evidence was admissible; for that upon the face of the record there appeared conclusive evidence in favour of the defendant, and that the plaintiff ought not to be permitted to give any such evidence to the point in issue, and the court accordingly refused to permit the plaintiff to go into any such evidence, and directed the jury to find in favour of the defendant, wherefore the plaintiff's counsel excepted to the said opinion and direction of the court, and prayed the said justices to affix their seals to the said bill of exceptions.

A writ of error was then brought in the House of Lords of *Ireland*, and on behalf of the plaintiff in error it was contended, that the recovery ought to be reversed, because it appeared from reason and authorities in law, that if a person insane, or an infant under the age of twenty-one years suffered a common recovery by attorney, it was an error for which the common recovery ought to be reversed; the acts of an infant and those of a person *non compos mentis* being equally invalid in this respect, they

they not having a capacity to transfer an authority to a third person to act for them. That as to the second error arising upon the bill of exceptions taken to the judgment of the court of King's Bench, which was, that the plaintiff in error was by matter appearing upon the face of the record precluded from trying the fact upon which issue was joined, and though the issue was joined, and the plaintiff and defendant agreed to try it by the country, yet the jury must try it without evidence; it was a doctrine which had never been heard of, and in support of which no case could be produced. The doctrine was, that the plaintiff was estopped from giving evidence, because it appeared on the record, that the Chief Justice of the Common Pleas had signed the caption of the warrant of attorney; and for this reason the plaintiff must be precluded from giving evidence of the incapacity of the late Lord *Ely*, at the time of the acknowledgment of the warrant of attorney.

In answer to which it was contended, that the insanity of the vouchee (who it was admitted appeared by attorney) was a matter of fact which, if true, made the recovery



erroneous, and that the plaintiff was not estopped from assigning it as error.

When a recovery is suffered by warrant of attorney, the very foundation and the whole of the proceeding is the warrant, and if the party executing the warrant has not capacity to execute it, every thing that follows in consequence of it must be void; it is the principal, and every thing afterwards is the accessory, and matter of form. It is a principle of law, that a person of that description cannot suffer a common recovery, cannot make a warrant of attorney: the case of an infant is the same; he cannot do either of those acts, and a jury is to decide the fact, whether he was or was not an infant. There are several authorities to shew that the same principle is adopted in the case of persons who are *non compos*, as in that of infants. In the case of *Thompson v. Leach*, Lord Chief Justice Holt and all the other Judges were of opinion that a surrender by a person *non compos* was absolutely void, and that the cases of infants and persons *non compos* were parallel in all things, except that a person *non compos* could not stultify himself. This case is also reported in 3 *Mod.* 301. and there it appears

1 Ld. Ray.  
315.

pears the court used this strong expression:  
“ The grants of infants, and of persons *non compos*, are parallel both in law and reason.” If this doctrine be true, it will only be necessary to shew, that if an infant suffered a common recovery by attorney, the person in remainder might assign that fact as an error. 1 *Roll. Abr.* 755. Pl. 6. If an infant brings a writ of error by his guardian, and it appears that he suffered a recovery by attorney, it shall be tried by a jury, 2 *Roll. Rep.* 85. There it was a case of a recovery suffered by husband and wife of the wife’s estate; the error was, that the wife was within age, and had appeared by attorney. Issue was joined in the fact, and it was held by the whole court to be error in fact, and to be tried by a jury. The same doctrine is established in *Cro. Eliz.* 739. and in 5 *Mod.* 209. Thus it appears to be settled, that if an infant appears by attorney, it is error in fact. Persons *non compos* and infants are in a similar situation in this respect. It therefore follows, that the appearance of Lord *Ely*, if he was *non compos*, is error in fact. If the principle that governs both cases be the same, something must be shewn in the warrant of attorney to distinguish this case, some difference in the power of the Chief Justice.

It

It rarely happens that any minute investigation is made by the Chief Justice; it is as much his duty not to take a warrant of attorney from an infant, as from an idiot; he ought not to take it; but if he does, it is not conclusive; it is as strong to say he was an adult, as to say he had a sound understanding: it may as well be argued, that the Chief Justice would not let him acknowledge the warrant if he was an infant. Infancy is triable by inspection, like ideocy. The trial of the fact in court is conclusive without a jury, but if the Chief Justice takes it upon himself, it concludes nothing; it is not his immediate business: the Chief Justice, in discharging this part of his duty, does no more than commissioners acting under a *dedimus potestatem de attornato faciendo*, and an acknowledgment before such commissioners is not conclusive. It may be argued, that there is a respect due to the Chief Justice; that his office is sacred.—It is admitted, that, in the discharge of his judicial office, he is not to be questioned; his integrity is not to be attacked; but every other error (says Lord Bacon) except corruption, may be ascribed to him.

Another



Another objection is, that it was a matter of record that he was of sound mind, and that something appears on record from which it is to be inferred, and cannot be contradicted. The whole that is said (and that is not on record) is, that the Earl appeared by attorney; but the warrant of attorney makes no part of the judgment, it is no part of the record, it does not go into the office of the prothonotary; and when the judgment is made up, that officer returns the record without the warrant, and does not return that until required by a special writ. Anciently the *dedimus potestatem* never came into the court of Common Pleas; it went into the court of Chancery; it was no part of the record. But even admitting that it was part of the record, still it does not estop the plaintiff from giving evidence of ideocy: the counsel for the defendant were well aware that it did not, otherwise they would have relied on it as an estoppel by demurring or pleading: but instead of that, they came to the bar of the King's Bench, made the objection of a sudden, and the judges were obliged to give that opinion of a sudden, which, if they had time to consider of it, they never would have given.

Even

Even if the warrant be considered as part of the record, yet it is no estoppel. An estoppel is an act by record deed or *pais*, by which the party is estopped from disclosing the truth of his case; this is not artificial reasoning; it is the very fact, it is exactly the *presumptio juris et de jure*. But it is a settled principle, that estoppels shall not be favoured. *Co. Litt.* 352. *a.* They are even considered as odious. *Co. Litt.* 365. *b.* Another rule as to estoppels is, that every estoppel must be certain to every intent. *Co. Litt.* 352. *b.* The estoppel here is, that *Nicholas* Earl of *Ely* acknowledged a warrant of attorney, from which it does not appear that he was of sound mind when he acknowledged it, or before, or after, or even at the moment, it can only be inferred—it must be inferred, that the Chief Justice enquired as to his capacity, and found him of sound memory. But in cases of estoppels, this cannot be supported by inference; it must appear directly before the court. Here the question of insanity was not directly before the court. The late Earl was not before any part of the court, but the Chief Justice; and a party may aver against the record, where  
it

it is not the act of the court. The case of Lord *Banbury* is strong to this purpose. He was indicted for murder, and petitioned the House of Peers to be tried at their bar. They determined, that he was not a Peer of Parliament, and the indictment was proceeded on in the King's Bench, and he pleaded his peerage there; to which the Attorney General replied the judgment of the Peers: to which Lord *Banbury* demurred, and the demurrer was allowed. The court agreed, that he was not estopped by that judgment from pleading his Peerage, because the question of his Peerage was not directly before the Peers, but incidentally. But they held, that if there had been a question of Peer or not Peer referred to that House by the crown, and that they had determined he was no Peer, it would have been conclusive.

In the case of *Wynne v. Wynne*, 1 *Wilson's Rep.* 35. where the error assigned was, that the vouchee died before the return of the writ of *Summoneas ad Warrantizandum*, the court were unanimously of opinion, that the plaintiff was not estopped from assigning this fact for error, because the death of the vouchee was not contrary to, but a matter

Ante f. 83. ]



matter collateral to the record, and properly assigned and triable *per pais*. From all which it was concluded, that evidence of insanity might be admitted in this case.

On the other side it was argued, that this was a writ of error brought sixteen years after the recovery suffered, fourteen years after the death of Earl *Nicholas*, whose capacity was now sought to be questioned, many years after the death of the Lord Chief Justice who took the acknowledgment, and after a variety of acts of dominion by the late Earl *Nicholas* in favour of creditors and purchasers. If then the plaintiff could, under these circumstances, overreach a common recovery upon the ground of incapacity in the man who had suffered it, the mischiefs would be endless. The common assurances of the realm would be shaken; the land marks of property would be destroyed, and no man could say that he held his estate by a secure title, because it would be in the power of any man, merely for the purpose of litigation, to question such title, not for any defect appearing upon the face of it, but merely on an allegation that a common

mon recovery (the ground and foundation of it) was suffered by a person who had not a sufficient degree of capacity to enable him so to do; by which means the credit due to the judicial character would be impeached; juries would be resorted to, to decide upon the integrity, skill and ability of the judges of the land; and the validity of common recoveries would be referred to the decision of a jury, against the solemn adjudication of the Court of Common Pleas; a court to which alone the law has entrusted the care of them, and which in the eye of the law is solely competent to guard against any abuse of that privilege, which confessedly belongs to every man who has an estate tail.

That if a common recovery could be impeached by writ of error, upon the ground of incapacity in the party acknowledging a letter of attorney, by parity of reason a fine levied by a feme covert might be impeached, upon an allegation that she really acted under constraint of her husband, although the Chief Justice of the Common Pleas, by receiving the fine, after having examined her, had determined it to be an act of her own free will: the principle in  
both

both cases being precisely the same. In both cases the Chief Justice has a judicial discretion to allow or disallow the parties to perform an act of record; and, the Chief Justice having once exercised that discretion, it is, in both instances, final and conclusive; and upon this principle, that in all cases there must be some conclusive evidence—evidence beyond which courts and juries cannot go; and in fines and recoveries, the peculiar necessity of adhering to this principle is obvious. They are the common assurances of the land; the title of every man to land, or to real security for money due to him, must almost necessarily in the course of two or three descents, depend upon a common recovery. If then the judicial discretion of a judge admitting a tenant in tail to do an act for his own benefit, and for the advantage of the public, and the degree of capacity of the man who has done such an act, could be afterwards questioned; and that too, after an interval of many years from his death, who could say, that he held his property by a secure title? Acts of record must lose their credit; they would no longer stand upon their own authority, but must depend upon the decision of juries.

That



That a common recovery was but a certain form or course allowed by the law, to be observed for the better assurance of lands, and was originally introduced for the express purpose of barring estates tail, remainders, and reversions. Common recoveries therefore were always objects of favour and protection in a court of law.—In the language of Lord *Hobart*, “judges are  
“astute in supporting them, and in invent-  
“ing reasons to maintain their authority.” Defects, which in adversary actions would be fatal, are overlooked in common recoveries.

After hearing counsel on this writ of error, the following question was put to the judges, “whether in a case where the  
“vouchee in a common recovery appears  
“by attorney, the caption of the warrant  
“of attorney, appointing such attorney  
“appearing upon the record to be taken  
“by the Chief Justice of the Common  
“Pleas, out of court, was conclusive evidence of the capacity of such vouchee  
“as to the soundness of his mind to make  
“such attorney, and suffer such recovery?”

The judges were divided. But the majority were of opinion, that the caption of the warrant of attorney, appearing on the record to be taken by the Chief Justice out of court, was not conclusive evidence of the capacity of the vouchee. Whereupon it was ordered and adjudged that the judgment given in the court of King's Bench should be reversed, and that the verdict should be set aside and annulled, and that the parties should proceed to a new trial upon the issue joined between them as in the said record.

A new trial was accordingly had on the 22d of *November*, 1784, at the bar of the court of King's Bench, when the plaintiff's counsel offered to give parol evidence to prove the fact upon which issue was joined, that is, to shew, that at the time of the caption of the warrant of attorney, &c. the said *Nicholas*, Earl of *Ely*, was of unsound mind, so as not to be able to manage himself, his lands, tenements, &c. But the counsel for the defendant insisted that the plaintiff ought not to be allowed to go into such evidence, as his counsel had offered, inasmuch as they on the part of the defendant had evidence of record to produce, which

which was conclusive to the fact in issue, and therefore could not be controverted, that is to say, a commission issued out of the court of Chancery, on the petition of *George Rochford* and *Alice* his wife, the father and mother of the plaintiff, on behalf of themselves and of the plaintiff, to try the sanity of *Nicholas Hume*, Earl of *Ely*, and the inquisition taken in consequence of such commission, by which inquisition it was found that the said *Nicholas Hume*, Earl of *Ely*, was not an idiot, or a person of unsound mind: and also a fine, with proclamations levied of the lands of which the recovery sought to be impeached had been suffered, and taken before the chief justice of the Common Pleas on the same day on which the warrant was acknowledged, which fine was levied to *Henry Loftus*, for the purpose of making him tenant to the *præcipe* in that recovery. The court being of opinion that this was the proper mode of proceeding, the defendant's counsel accordingly gave in evidence to the jury, the said commission and inquisition, finding that *Nicholas Hume*, Earl of *Ely*, was not an idiot or person of unsound mind: and also a fine, with proclamations, levied by the said *Nicholas Hume*, Earl of *Ely*, of the

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lands,



lands, &c. in the said recovery to *Henry Loftus*, for the purpose of making him tenant to the *præcipe*, and which was taken by the Lord Chief Justice of the Court of Common Pleas, on the 8th of *July*, 1767, being the same day on which the acknowledgment of the warrant of attorney was taken by the same Chief Justice. And the counsel also gave in evidence the warrant of attorney and the caption thereof. And the defendant's counsel thereupon insisted that the said inquisition, finding that *Nicholas Hume*, Earl of *Ely*, was not an idiot or person of unsound mind, had for ever concluded that question. That the fine and recovery were both before the court; that the fine was of the same lands, and passed the same estate on the same day to the tenant to the *præcipe* in the recovery, on which the warrant of attorney was acknowledged, and that it constituted a part of the same assurance: that the fine gave, and was meant to give operation to the recovery, and that without it the recovery would have been a mere nullity: that therefore there was a mass of evidence, conclusive as to the sanity of *Nicholas*, Earl of *Ely*, and of a nature not to be controverted, laid before the court, and that no parol evidence could

could or ought to be received on the part of the plaintiff as to the issue depending.

The court having declared it to be their opinion that the said fine, *præcipe* and concord, together with the caption of the said fine, as likewise the said warrant of attorney and the caption thereof, were conclusive evidence of the sanity of the said Earl of Ely upon the said issue. A verdict was therefore found for the defendant, and judgment given thereon by the court of King's Bench, "that the judgment of the court of Common Pleas should be in all things affirmed, and remain in full force and effect, notwithstanding the causes assigned for error."

A bill of exceptions was taken to the opinion of the court, and a writ of error was brought in the House of Lords.

In support of this writ of error, it was contended on the part of the plaintiff, that the court of King's Bench had erred in their judgment, and ought to have permitted the plaintiff in error to have laid before the jury, evidence to prove the fact referred by both parties to the jury, and

ought not to have determined that the said fine and the caption of the said warrant were conclusive evidence of the said fact.

1st. Because it was an incontrovertible maxim of law, that the fine of a tenant in tail did not take away the right of him in remainder, but if the fine levied by *Nicholas Hume*, Earl of *Ely*, should be held conclusive evidence of his sanity against the plaintiff in error, so as to estop him from proving that Earl *Nicholas* was not of sound mind at the time set forth in the pleadings, then the fine of the tenant in tail would be made by the judges, to do *indirectly* that which the law declares it cannot do *directly*, namely, to destroy the title of the remainder man.

2dly. Because the House of Lords having reversed the judgment of the court of King's Bench, which held the record of the recovery conclusive evidence of the sanity of Earl *Nicholas*, and having directed the parties to proceed to a new trial of the issue joined between them upon that fact, it was now settled by the final judicature, that a recovery suffered by warrant of attorney, might be reversed for the incapacity of the  
vouchee,



vouchee, appearing by attorney, and that the remainder-man affected by that erroneous recovery had a right to prove before a jury, that the vouchee in the recovery was *non compos mentis*; but if the fine of *Nicholas*, Lord *Ely*, should be allowed to operate as an estoppel against all proof of the unsoundness of his mind, at the times specified in the issue, then the recovery, which has been adjudged reversable for that error, would become irreversable by the effect of a fine, which in itself could not prejudice the right of the appellant, the remainder-man, and thus the late decision of the House in this case, would be rendered altogether nugatory and ineffectual.

3dly. Because the present action was a writ of error to reverse the common recovery suffered by Earl *Nicholas*, and not to reverse any other act of his whatsoever; the validity or effect of the fine was not now in controversy between the parties; the rule, which says, that a fine shall not be questioned for the insanity of the conusor, applies not to the case of a plaintiff who does not seek to impeach or interfere with that fine, but merely to reverse a judgment in another species of real action, namely a com-

mon recovery; the fine may be good, and the recovery erroneous; and although a fine may be allowed to protect itself, yet to infer from thence, that any other act of the person, who levied that fine, shall not be impeached for insanity, was to give an operation to fines, which, till the present case, has never been thought of.

4thly. because the issue in the present case was, whether Lord *Ely* was, on the 19th day of *June*, the day of the *teste* of the writ of entry, and the 6th day of *July*, the day of the judgment, and the 8th day of *July*, the day of the supposed acknowledgment of the warrant of attorney of sound mind, &c. and if the plaintiff had given sufficient evidence of insanity at any of those periods, there should have been judgment to reverse the recovery, but the caption of the fine could not have proved the sanity of Earl *Nicholas* at those several periods; and therefore ought not to have been allowed to operate as an estoppel to the evidence on the part of the plaintiff.

5thly. Because from the preceding reasons it manifestly appeared that the fine levied by Earl *Nicholas*, was not conclusive evidence

evidence of his sanity, upon the issue joined between the parties in this cause, and it had been solemnly decided, that the warrant of attorney acknowledged before the said Chief Justice in the common recovery was not conclusive evidence of sanity; so far therefore as the judgment of the court of King's Bench declared the fine to be, in this action, conclusive evidence of his sanity, it militated against the settled maxims which govern fines and recoveries; and so far as it declared the warrant of attorney to be conclusive evidence of the sanity, it was directly subversive of the former judgment. And if neither the fine, the warrant of attorney, or the inquisition, were separately conclusive evidence of the sanity, it was impossible they could become so by being united, for though several circumstances when joined together, may greatly increase the mass or weight of evidence, yet it seemed repugnant to the natural course of things, that conclusive evidence should arise from ever so many circumstances or pieces of evidence, not one of which being in itself conclusive evidence.

6thly. Because the parties had here joined issue on the fact of sanity; the question,



tion, whether *Nicholas*, Lord *Ely*, was of sound mind, or not, at the times mentioned in the pleadings, was a mere matter of fact, fit only to be tried and decided by a jury, and was a point, which the parties had themselves expressly referred to a jury; it was therefore conceived that the jury ought to have been permitted to try the point in issue between the parties, and that the plaintiff had a right to lay his evidence before them.

7thly. Because the proof of the issue lay, in this case, on the plaintiff in error, and the defendant should not have been permitted to have gone into any evidence on his part, until the plaintiff had laid the whole of the evidence which supported his allegation in the pleadings before the jury, who were not bound by estoppels, but might find the truth if they thought fit. Whereas the court of King's Bench prevented the plaintiff from laying any evidence on his part before the jury, and permitted the defendant to produce evidence, which even, in their own opinion was not conclusive; that is, the court allowed one of the parties to go into the proof of his case, and denied that right to the other.

On

On the other side it was contended on behalf of the defendants in error, that the judgment of the court of King's Bench should be affirmed, for the following reasons :

1st. Because the inquisition, finding, " that *Nicholas Hume*, Earl of *Ely*, was not " an idiot, or person of unsound mind," was conclusive, as to the fact in issue upon the present writ of error. With respect to personal disability, arising from a defect of understanding, the law admits of no degrees in such a defect, save only ideocy and lunacy. A man of full age, neither idiot nor lunatick, is, in the eye of the law, completely *sui juris*. No act of his can be impeached in a court of law, for defect of understanding ; and in a court of law, no man can be considered, to be either idiot or lunatick, until he be so found on record. The antient mode of proceeding, in order to ascertain the fact of ideocy or lunacy, seems to have been by writ directed to the sheriff, or the escheator. The modern practice is, to petition the Chancellor, to issue a commission to inquire, whether or not, the party be idiot or lunatick. In either case, the inquiry must be by a jury of twelve

twelve men, who proceed to determine the fact, as well by extrinsick evidence, (if necessary) as by personal examination. If upon the inquisition returned, the party be found ideot or lunatick, this finding is traversable; but if he be found not to be ideot or lunatic, this finding is not traversable. In the one case, the party may himself, or his friends may, for him, come into the court of Chancery, and desire that he may be examined, and the trial shall be by examination, and the finding upon that examination, be it what it may, is peremptory. *Bro. Tit. Ideot, Pl. 4. 9. Co. 31. F. N. B. 13. 233. New Edit. 531.* The law then appears to be clear, that whether upon a writ issued *de idiota inquirendo*, or upon a commission issued for the same purpose, a man, if he be found ideot or lunatick, may traverse that finding, and the finding upon such traverse shall be peremptory; but if he be found sane, such finding is, in the first instance, peremptory, and never can be traversed: and so it was determined in a former stage of this cause, by the Lord Chancellor *Bowes*, upon an application made on the part of the plaintiff to his lordship, to direct a new enquiry with respect to the sanity of *Nicholas, Earl of Ely*,  
when



when his Lordship was pleased to declare,  
“ that there was no instance in the history  
“ of the *Engliff* law of a second inquiry,  
“ where the party was found sane, that up-  
“ on such a finding the party was, for ever,  
“ in the eye of the law, completely *sui*  
“ *juris*,” and accordingly his lordship dis-  
charged an order of his court, which re-  
strained *Nicholas*, Earl of *Ely*, from suffering  
recoveries of his estates ; in consequence  
of which, the recovery, which the plaintiff  
now seeks to impeach, was suffered.

2dly. Because, if, during the life of the  
party, after an inquisition finding him sane,  
no farther enquiry can by law be made re-  
specting his sanity, it seems to carry very  
great absurdity and injustice, on the face of  
it, to suppose that such an enquiry can be  
made, after his death : the proper mode of  
trial is, by personal inspection, in the case  
of a traverse by a party, who is found idiot  
or lunatick, personal examination is the  
only mode of trial, which can be admitted,  
and this alone seems decisive against the  
plaintiff, upon the present question ; and so  
it has been determined by Lord *Hardwicke*,  
3 *Atk.* 312.

3dly. If,

3dly. If, after the death of a man, who has been found sane upon a solemn trial, by the verdict of twelve men, his heir, or a remainder man, shall be allowed to impeach his acts, upon an allegation of insanity, the mischief and injustice of such a proceeding, would be truly alarming. The object in issuing a commission of ideocy or lunacy, is to ascertain, whether the party shall be allowed to exercise acts of dominion over his property, or whether his person and estate shall be taken into the custody of the crown, for the benefit and safety of his heir : accordingly, no act of a man can be impeached in a court of law, upon the ground of insanity, until after inquisition, finding him idiot or lunatick : after such an inquisition, alienations by him not of record may be avoided by *scire facias*, at the suit of the crown, but at the suit of the crown only ; and if such alienation has been by matter of record, it cannot be avoided even by *scire facias* at the suit of the crown, 4 Co. 126. What then must be the consequence to purchasers and creditors, who may be induced to deal with a man, who, upon a solemn trial, has been determined to be, in the eye of the law, completely *sui juris*, if at  
any

any distance of time after his death, his heir, or a remainder-man, shall be allowed to impeach his acts, whether of record or not, upon alledging incapacity, and that too, when from the death of the party, the proper mode of trial, by personal inspection, has become impossible? It is therefore humbly submitted, as was emphatically stated, by the first law authority in this kingdom, in delivering his opinion judicially in a former stage of this cause. "That no court of justice is now at liberty "to go into an enquiry, whether *Nicholas*, "Earl of *Ely*, was an idiot or of unsound "mind; the finding is conclusive; that "point has now received a final determination, in a proper, grave course; and, if "it could be again examined into, it "would be of most dangerous consequence: in the earl's life-time he might "have traversed, if the finding had been "against him, but the finding was for him, "by which, he was left to the liberty of "his person, and of his estate."

4thly. It was contended, that the fine in this case, if it stood alone, must of necessity, conclude the question of sanity. In every real action, there must be a demandant and  
tenant;



tenant; the demandant is the party grieved, who, in a course of justice demands reparation, for a *tort* done to him; the tenant is the wrong-doer, who withholds the lands demanded; hence it is, that in every common recovery, it is necessary, in the first instance, that the party who means to suffer it, shall convey an estate of freehold in the lands to the nominal tenant; because, though a common recovery, is, to some intents, deemed a fictitious proceeding, yet forms of an adversary action must be observed. In this case, the freehold was conveyed by *Nicholas*, Earl of *Ely*, to *Henry Loftus*, the tenant in the recovery, by fine. It cannot be questioned, that the Chief Justice who took the acknowledgment of that fine, by so doing, judicially determined, the capacity of Earl *Nicholas*, to acknowledge the fine, or in other words, to convey the freehold of his estate, for the purpose of suffering a common recovery. It was, accordingly, admitted in argument by the plaintiff's counsel in the court below, that the fine could never be shaken, upon the ground of incapacity in Earl *Nicholas*; but an attempt was made, to evade the force of it, by insisting, that with respect to any distinct and different proceeding, no evidence

dence whatever of sanity arose from it. This argument, however, rests upon a gross and unfounded assumption of a fact; because, here the evidence applied, not to a distinct and different proceeding, but to different branches of one and the same proceeding. In this case the fine was levied by the vouchee, for the purpose of making a tenant to the *præcipe* in this recovery; this appears on record, by a writ of entry being brought by the demandant in the recovery, against the cognizee of the fine, and the fine and recovery are but one assurance to cut off the entail, *Pigot* 54. So that it is plain and palpable, that if the plaintiff cannot by law impeach the fine, which makes a tenant to the *præcipe*, for insanity in *Earl Nicholas*, (which, it is admitted, he cannot) he is equally concluded from impeaching every other branch of the recovery, which is founded on that fine, upon the same ground of incapacity; all constituting one and the same conveyance or common assurance.

5thly. The error assigned here is, that *Earl Nicholas* was not of sound mind at the time when he appointed an attorney to appear for him. Now, the acknowledgment

of the fine, and the acknowledgment of the warrant of attorney, were taken at one and the same time, for one and the same purpose, by the same Chief Justice; and composed only different parts of the same legal transaction, and it is admitted, "that the caption of the acknowledgment of the fine is conclusive evidence of the capacity of *Earl Nicholas* at that time, to convey the freehold of his estate to the tenant in the recovery; and that the Chief Justice of the court of Common Pleas, did, by taking the acknowledgment of that fine, judicially determine his capacity for this purpose." Upon what principle then, of reason or common sense can it be asserted, that it is not equally conclusive evidence of his capacity, at the same moment to acknowledge the warrant of attorney, which is but another, and a subordinate act necessary to give effect to that conveyance, of which, it must be admitted, the fine is and was meant to be the ground and foundation?

6thly. For that a common recovery is but a certain form or course allowed by the law to be observed, for the better assurance of lands, and was originally introduced,



duced, for the exprefs purpose of barring estates tail, remainders and reversions. Common recoveries therefore are always objects of favour and protection in a court of law. In the language of Lord *Hobart*, "Judges are astute in supporting them, "and in inventing reasons to maintain "their authority," defects, which in adversary actions, would be fatal, are overlooked in common recoveries.

After hearing counsel on this writ of error, the following questions were put to the judges.

1. Whether the commission set forth in the said record, and the inquisition thereon, whereby it was found that *Nicholas Hume*, Earl of *Ely*, in the said commission named, was not at the time of taking the said inquisition, an idiot, or a person of unsound mind, with the return of the execution of the said commission, which were given in evidence on the part of the defendant in error on the trial of the issue at the bar of the court of King's Bench, in *Michaelmas* term, in the year 1784, joined upon the averment taken by the plaintiff in error in the said cause, was in point of law,

D d 2

con-

conclusive evidence of the sanity of the said *Nicholas Hume*, Earl of *Ely*, at the time of taking the warrant of attorney set forth in the present record, and of his capacity at that time as to the soundness of his mind, to make such warrant of attorney, and suffer such recovery, as in the said record; so as to justify the said court of King's Bench in refusing upon the trial of the aforesaid issue, to suffer the plaintiff in error to go into parol evidence offered by him to prove that the said *Nicholas*, Earl of *Ely*, was of unsound mind at the time of the said warrant taken and acknowledged, and the said recovery suffered.

2. Whether the commission and the inquisition and return thereon, whereby it was found that *Nicholas Hume* Earl of *Ely*, was at the time of taking the said inquisition, not an idiot or a person of unsound mind, together with the fine, *præcipe*, concord, and caption of the said fine, as likewise the warrant of attorney and the caption thereof, on the 8th day of *July*, 1767, as set forth in the said record, and what part of the said evidence were in point of law conclusive evidence upon the issue, which came on to be tried at the bar of the court of  
King's

King's Bench, of the sanity of the said *Nicholas Hume*, Earl of *Ely*, and of his capacity as to the soundness of his mind to make such warrant of attorney, and suffer such recovery, as in the present record, issue having been joined upon the averment taken by the plaintiff in error on the said cause, after the death of the said *Nicholas*, and the said warrant of attorney and caption thereof set forth in the record, appearing to have been made and acknowledged before the said Chief Justice of the court of Common Pleas, at the same time that the caption of the said fine was taken and acknowledged by and before him, and it appearing to the said court upon the said record, that the tenant to the *præcipe* in the said recovery was made by fine, levied and acknowledged by the said *Nicholas*, so as to warrant the said court of King's Bench, in refusing upon the trial of the aforesaid issue to permit the plaintiff in error to go into parol evidence, offered by him to prove that the said *Nicholas* was of unsound mind at the time of the said fine taken, and warrant of attorney acknowledged and recovery suffered.

3. Whether in case where a fine with proclamations is levied by tenant in tail,

D d 3

and



and the *præcipe* is brought in the same term against the conusee of such fine, and a common recovery suffered thereupon, such fine, *præcipe*, and common recovery are to be considered in law as one common assurance or conveyance, or as separate common assurances or conveyances.

As to the first question, the judges were unanimously of opinion, that the commission and inquisition were not conclusive evidence of the sanity of *Nicholas*, Earl of *Ely*. As to the second question, four of the judges were of opinion, that the acknowledgment of the fine was not conclusive evidence of the sanity of *Nicholas*, Earl of *Ely*, and three of the judges were of a contrary opinion, and as to the third question, the judges were unanimously of opinion, that the fine and recovery were to be considered as one assurance.

The judgment of the court of King's Bench was affirmed.

*According to W. Ridgeways's Parl. Cas. in Ireland the judgment was reversed on a writ of 16<sup>th</sup> Aug. 15.*

The author has been favoured with the following accurate note of Lord Chief Baron *Yelverton*'s argument in this case. And as his Lordship's opinion coincided with

with that of the majority of the Judges, ~~and~~ and also of the Lord Chancellor, it is presumed that it must prove extremely acceptable to the profession.

The court of King's Bench has determined, and the judges have all agreed, that the inquisition finding *Nicholas*, Earl of *Ely*, not to have been an idiot, or of unsound mind, is not conclusive evidence of his sanity at the time of acknowledging the warrant of attorney mentioned in the question: your Lordships have determined that the warrant of attorney is not in itself conclusive evidence of the sanity of Lord *Ely*, at the time of acknowledging such warrant; but that it is a matter in *pais*, and triable by a jury: the only remaining question therefore is, whether the fine be conclusive evidence of his sanity, at the time of acknowledging the warrant. The fine I do admit is *quasi* a judgment, and in that light I will beg leave to consider it; but it is not therefore conclusive evidence of the sanity of the conusor, to do another act.— In what cases judgments shall conclude either as pleas or as evidence, is no where better defined than in that learned argument of Lord Chief Justice *De Grey*, in the

Lord Cb.  
Baron Yel-  
verton.

State Trials,  
Vol. XI. p.  
261.

Dutchess of *Kingston's* case; "first, that  
"the judgment of a court of concurrent  
"jurisdiction, directly upon the point, is as  
"a plea, a bar, or as evidence, conclusive  
"between the same parties, upon the same  
"matter, directly in question in another  
"court. Secondly, that the judgment of  
"a court of exclusive jurisdiction, directly  
"upon the point, is, in like manner, con-  
"clusive, upon the same matter, between  
"the same parties, coming incidentally in  
"question, in another court, for a differ-  
"ent purpose. But neither the judgment  
"of a concurrent or exclusive jurisdiction  
"is evidence, of any matter which came  
"collaterally in question though within  
"their jurisdiction; nor of any matter in-  
"cidentally cognizable; nor of any mat-  
"ter to be inferred by argument from the  
"judgment."

These rules are laid down with so much  
precision and accuracy, that there is not a  
word contained in them which has not its  
sterling value, nor has a case been cited,  
nor do I believe a case can be put, which  
does not fall within them, for either they  
are cases, where acts of parliament have  
established exclusive jurisdictions, between  
certain



certain parties, as the certificates of commissioners for settling army accounts, or the proof of debts before commissioners of bankrupts under the control of the great seal, or sentences in matrimonial causes, annulling a marriage, where one of the parties, in a civil suit, claimed a title, or founded a defence upon such marriage; or sentences of exclusive jurisdiction, acting directly in *rem*, and to which all the world are supposed to be parties, as condemnations in the court of Exchequer, which are had by publick proclamations, inviting all persons whatsoever, to come in, and claim their property, or the sentences of Admiralty courts, which judge between nation and nation, and from whose decision there lies no appeal but to the sword. But in all these cases the parties to the suits, or the parties against whom the evidence was received, were parties to the sentences, and had acquiesced under them, or derived under those who had, or they were sentences in suits to which all persons were or might have been parties.

Now, if a fine were like an ordinary judgment of a court of competent jurisdiction, it would not be conclusive evidence  
in

in the present instance, and for these reasons ; because there is no act of parliament which has made a fine under these circumstances conclusive against a remainder-man ; the remainder-man does not claim under the fine, he never could be said to acquiesce under it, because he could not impeach it, he is no party to it, nor does he claim under any man who, is. And though I must acknowledge that fines do in some respects stand on a ground peculiar to themselves, a ground whereon the wisdom of our ancestors hath placed them, for the assurance of titles, and quieting of possessions ; yet I must say that, that memorable act, which gives to fines their present force and efficacy, which directs their operation, and where they operate, has made them irresistible, does not in any of its provisions, materially depart from those rules, under which other judgments have been held to be conclusive : for the effect of that act is two-fold. Under that act a fine with proclamations, by tenant in tail, whether the proclamations are finished in his life-time or not, will bar the issue in tail. But why ? because the fine is *quasi* a judgment, and the issue in tail claims the estate through his ancestor, whose right was

was

was barred by the judgment.—Again by that statute, a fine, with proclamations, if five years after the title accrued are suffered to pass without claim, will bar every man who does not come within the savings of that act. But why? because there the fine acts, *quasi in rem*, for by the proclamations, all men are invited to claim, if any right they have, and having failed to do so, within the time prescribed by law, they are therefore barred. But the case of the plaintiff in error does not fall within either of these conclusions, for he is not the issue in tail of the conusor of the fine; nor is the fine produced against him, as a judgment to bar his right. If the defendant in error intended to make that use of it, he ought to have pleaded it to the writ of error, and have given the plaintiff an opportunity of replying that he claimed within the five years, or that he came within the savings of the act. The fine is therefore offered, not as a bar to the right of the plaintiff in error, by its own force, but as conclusive evidence of the sanity of a conusor to do another act, which is a bar to his right. And so, though it does not bar the right, it takes away the remedy; and though it would not conclude, if pleaded

ed



ed as a judgment, yet, when offered as a piece of evidence, it shall have the magic virtue of sealing up the lips of the court and the jury, the parties and the witnesses. —But I know of only one case, where it has been held that a fine is conclusive to the capacity of the conusor to do another act, and this is the case of a fine and a deed leading the uses of that fine. In that case, it has certainly been held for law, that a man whose right is by law barrable by a fine, shall not be received to aver against the capacity of the conusor to execute the the deed ; because it is said, the fine is the principal and the deed, the accessory ; and a man who is enabled to do the principal, shall not be held disabled to do the accessory. But that rule of law was adopted through necessity, because all fines operate to uses, and uses are governed by the intent. Whereas if the deed were avoided, the fine would no longer operate to the uses to which it was intended to enure, and so the fine would in effect be avoided, because the uses of it, could not take place. But to apply that rule to the case of a fine and recovery, it would be necessary to establish two positions, neither of which is true. First, that the fine is the principal, and the recovery

recovery the accessary; and, secondly, that if you avoid the recovery, you also avoid the fine. But there is not a single saying in the books, that the fine is the principal, and the recovery, the accessary; for the only use of making the tenant to the *præcipe* by fine, is, to put the evidence of there being a good tenant to the *præcipe* on record; and though you should avoid the recovery, the fine will nevertheless stand, for the writ of error does not impeach, nor will the judgment reach it. And *vice versâ*, though the fine should be hereafter avoided, yet the recovery would not be thereby avoided, if it were otherwise good. And with respect to a recovery, and a deed leading the uses of a recovery, the law is the very reverse of what it is in the case of a fine, and a deed leading the use of a fine. In the case of a recovery and deed, the deed has in more instances than one been held to be the principal, and the recovery the accessary; and accordingly a party, whose right would be otherwise barred by the recovery, has been allowed to impeach the sanity of the vouchee, at the time of the execution of the deed, and so avoid the operation of the recovery. — But it seems to be conceived that there is a something or other in this case, which

which distinguishes it out of the ordinary rules of law. I will therefore beg leave to examine, what that something is, by applying myself immediately to the interrogatories contained in the question. And, first, the question imports a doubt, whether two or more acts, do in point of law, make one and the same assurance: the capacity of the agent to do one act does not conclude to his capacity to do the other; and consequently, whether the capacity of Lord *Ely* to levy the fine, does not conclude his capacity to acknowledge the warrant of attorney: but my answer is, that there is only one instance in which the capacity of an agent to do one act, concludes to his capacity to do another, where the two make one assurance; and that is the case of a fine and deed leading the uses; but in every other case but that, I answer in the negative; and I prove the truth of my answer thus. If a man had levied a fine twenty years ago, with intent to make a tenant to the *præcipe* in a recovery then intended to be suffered, and the recovery is not suffered for twenty years after, the fine and recovery are in point of law, one and the same assurance, as much as if they were both of the same term; and yet no man in  
his



his senses will say that a fine levied twenty years ago, is conclusive evidence of the sanity of the conusor twenty years after. But then the question asks, where two acts are done at one and the same time, and one of those acts is in itself conclusive evidence of the capacity of the agent to do that act, shall it not be conclusive evidence of his capacity to do the other. But my answer to that question is also in the negative; because if it were otherwise, then the act which is in itself conclusive evidence of the agent's capacity to do that act, would be conclusive evidence of his capacity to do any other act whatsoever, whether it made a part of the same assurance or not. And so if an idiot levied a fine, and the history of the law proves, that idiots have been received to levy fines, and at the same time made his will, that fine would be conclusive evidence of his capacity to make such a will, which no man in his senses will maintain. But the question enquires farther, whether, where two acts, the one of which is conclusive in itself, and the other not, make but one assurance and are done at one and the same time, these two circumstances put together, do not make one act conclusive evidence of the capacity of the agent to do

do the other. But I answer, not, because I believe no two acts can be supposed more intimately connected with each other, both in unity of time, and of assurance, than a will of a real and a personal estate, written upon one and the same piece of paper or parchment, and subscribed by one and the same signature; and yet it is clear law, that though the probate of such a will is conclusive evidence of the sanity of the testator to make such will, yet it is by no means conclusive evidence of his capacity to dispose of his real estate. And why? evidently because the capacity of the party to do the two acts, is triable by different jurisdictions. And the same reason applies to the case of the fine and the warrant of attorney: for as the capacity of the testator in the first case is triable by the Judge of the Spiritual Court, as to the personal estate, and his capacity as to his real estate by a jury, so in the latter case the capacity of the conusor to levy the fine, is triable by the fine itself, and his capacity to acknowledge the warrant, is triable by a jury. From all which I am warranted to lay it down as a general position, that the capacity of a party to do one act, is not conclusive to his capacity to do another, if his

I

capacity

capacity as to that other be triable by a different jurisdiction, whether the two acts make one and the same assurance, or are done at one and the same time or not.

It will then perhaps be asked what ? and has the fine no operation ? is it not even evidence ? I answer that it has all the operation, it was ever intended to have, it has made a good tenant to the *præcipe*, and has put the evidence of it on record : and if the plaintiff in error had assigned for error, that there was not a good tenant to the *præcipe*, he would have been concluded by the fine : and further, if the fine had been pleaded to the writ of error, as a fine with proclamations, upon which five years after the title accrued had run, without any claim, and that the plaintiff in error could not reply, that he had claimed within the five years, or that he came within the savings of the statute, he would in like manner have been barred by the fine. But as the case is at present circumstanced, the fine proves nothing conclusively but its own existence. I say it proves nothing conclusively but that : but, when I say so, I would not be understood to mean, that it is not evidence to go to a jury ; for, on the contrary, I



think it is evidence, and evidence of the most persuasive nature, but especially when coupled with the inquisition and warrant of attorney : for though I cannot subscribe to the doctrine which the question seems to insinuate, that a legal conclusion admits of degrees of comparative strength, or that it is more or less conclusive at different times ; and though I can no more admit that three pieces of evidence, none of which is conclusive in itself, do altogether amount to a conclusion, any more than I can, that three cyphers make a unit, yet I feel very sensibly that persuasive evidence may be more or less strong according to its nature, and that three pieces of evidence tending to establish one and the same fact, are stronger evidence, than one of them would be singly. And therefore, upon the whole, my answer to the second question is, that the inquisition, the fine, and the warrant of attorney, are not in any case which has been put singly, or altogether conclusive evidence, so as to warrant the judgment of the court of King's Bench.

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